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No. ____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CHARLES W. LINDENMEIER, et al.
PETITIONERS,

vs.

SIEMENS POWER CORPORATION, et al.
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 1996

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QUESTIONS PRESENTED

1. Whether, as a matter of federal law, plaintiffs have pled a claim for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), which is controlled by this Court's resolution of *Varity Corp. v. Howe*, 1996 WL 116994 (March 19, 1996)?

2. Whether, in light of this Court's decision in *Varity* (which eliminated the conflict between the courts of appeal on the issue of whether individual plan participants and beneficiaries can state a claim for breach of fiduciary duty under ERISA), the court of appeals' decision in this case should be reversed and the matter remanded for further proceedings?

PARTIES TO THE PROCEEDINGS

Petitioners are Charles H. Lindenmeier, Margaret K. Ballard, Joan K. Lusty, Richard H. Nelson and William W. Porath, individually and on behalf of a putative class of approximately 600 active and retired employees of Exxon Nuclear Company, Inc. ("ENC"). Respondents are Siemens Power Corporation (formerly Exxon Nuclear Company, Inc., Advanced Nuclear Fuels Corporation, Siemens Nuclear Power Corporation); and Siemens Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Charles H. Lindenmeier, Margaret K. Ballard, Joan K. Lusty, Richard H. Nelson and William W. Porath, by their undersigned counsel, respectfully petition this Court for a writ of certiorari to review the judgment of the court of appeals in this case.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 24, 1995. Petitioners filed a Petition for Rehearing, which the Ninth Circuit denied on December 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 1331, 1337, 2201 and 2202.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are:

29 U.S.C. §§ 1002(1); 1002(2); 1002(3); 1002(5); 1002(16); 1002(19); 1002(21)(A); 1102; 1104(a); 1109; 1132(a); and 1132(c). They are reproduced in the Appendix at App. 105a-115a.

STATEMENT OF THE CASE

Proceedings And Decisions In The District Court

This class action alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, federal common law and state law; a specific claim for breach of fiduciary duty was pled. App. 62a-63a. In this Petition, Petitioners seek relief *only* as to their breach of fiduciary duty claim.

Petitioners, who were the plaintiffs in the court below, brought this action on behalf of approximately 600 hourly and salaried, non-union, active and retired employees of Exxon Nuclear Company, Inc. ("ENC"), who (along with their beneficiaries) were participants in the ENC employee welfare and pension benefits plans and who remained with ENC after a stock sale to Defendants on or about December 31, 1986. App. 37a. As ENC employees, Petitioners sued the then-current incarnation

of ENC, Siemens Power Corporation ("SPC").[1] In connection with the stock sale and pursuant to an express contractual promise, Defendants[2] agreed to continue to provide ENC employees with the same or equal pension and welfare benefits that they were entitled to receive prior to the stock sale. Defendants made this express promise in consideration for the employees' agreement to continue their employment with ENC after the stock sale. *See* App. 38a.

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[1]SPC is the successor to all of the interests and obligations of ENC. SPC was previously called Advanced Nuclear Fuels Corporation ("ANF") and Siemens Nuclear Power Corporation. SPC was at different times a wholly-owned subsidiary of Siemens Corp., Siemens Capital Corporation ("Siemens Capital") and Siemens Kraftwerk Union Aktiengesellschaft, Inc. ("KWU"). App. 40a. (Collectively "Defendants").

Siemens Corp., a Delaware corporation, is a holding company for power generation operations located in the United States and owned and operated by Siemens, A.G., the parent company located in Munich, Germany. Following its purchase of ENC, KWU transferred the stock of what is now SPC to Siemens Capital, which ultimately merged into Siemens Corp. In or about September 1988, Siemens Corp. succeeded Siemens Capital as the sponsor and administrator of the pension and welfare benefit plans involved in this class action. App. 41a. Defendants are SPC (formerly ENC) and Siemens Corp. Plaintiffs have at all times worked for the same entity, ENC renamed SPC.

[2]To provide a convenient nomenclature for Defendants, Petitioners collectively grouped and labeled Defendants as "Siemens" in the Complaint and in briefing before the district court and the court of appeals. This reference may have contributed to the artificial line of demarcation the lower courts found between ENC and SPC where no difference in the entity existed.

In connection with this stock sale, Petitioners claimed that their ERISA rights had been violated. Defendants provided benefits as promised for more than five years, at which time they unilaterally renounced these agreements and reduced or eliminated Petitioners' pension and welfare benefits in violation of ERISA. App. 52a.

The district court entered a Judgment on Decision in which it granted Defendants' Rule 12(b)(6) Motion to Dismiss on all nine counts. The district court did not grant Petitioners leave to amend their Complaint. Petitioners filed a Motion for Reconsideration which the district court denied in its Order on Motion for Reconsideration. App. 16a-35a. The district court construed Petitioners' Motion for Reconsideration as a motion to amend the Complaint and found "that plaintiffs can prove no set of facts entitling them to relief under the legal causes of action set forth in the complaint." App. 34a. In addition to denying Petitioners the opportunity to replead, the district court permitted only very limited discovery which occurred shortly before the hearing on the Motion to Dismiss. App. 81a-85a.[3]

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[3]The lack of adequate discovery and denial of leave to amend precluded plaintiffs from alleging additional facts contradicting the district court's factual holdings. An example before this Court is a document from which plaintiffs' counsel read out loud during oral argument in the Ninth Circuit. That December 24, 1986 plan document was adopted one week before the closure of the sale. It differs materially from documents the district court held controlling. Plaintiffs' counsel explained that the document came into plaintiffs' possession shortly before the hearing on the Motion to Dismiss and that it contained different language than that relied upon by the

Among their ERISA claims, Petitioners alleged a claim for breach of fiduciary duty. App. 62a-63a. Petitioners alleged facts showing that in their fiduciary capacity ENC/SPC made representations to Petitioners that their welfare benefits and pension benefits would remain the same after the stock transfer and that by these representations, defendants lured them into remaining at ENC after the stock transfer. *See* App. 43a-51a. Petitioners also alleged that Defendants owed them a fiduciary duty under ERISA and that Defendants failed to "discharge that duty solely in the interest of the plans' participants and beneficiaries...." App. 62a. Hence, Petitioners alleged similar facts to those alleged by the plaintiffs in *Varity Corp. v. Howe*, 1996 WL 116994, 3-8 (March 19, 1996), and relied upon the same statutory authority for that claim. *Id.* at 11.

The Court of Appeals' Decision

The Ninth Circuit affirmed the district court's dismissal without leave to amend of Petitioners' claims for violations of ERISA, federal common law and Washington state law arising out of Defendants' elimination and reduction of pension and welfare benefits.

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district court. App. 81a-85a. Petitioners were also precluded from amending to allege other facts including that this document identified ENC's Manager of Employee Relations as a named fiduciary.

Factual Background

The promised benefits provided that Petitioners' pension and welfare benefits would vest upon the attainment of "annuitant status," which was defined as 55 years of age and 15 years of employment. *See* App. 43a-44a. The parties agreed that retaining ENC's employees was crucial to both the success of the acquisition and the continued success of the acquired company. App. 43a-45a.

Throughout the negotiations for the stock sale, Defendants repeatedly represented, promised and agreed that in consideration for continued employment at ENC by Petitioners and the members of the Class, Defendants would continue to provide Petitioners with pension and welfare benefits which were the same as or equal to the benefits previously provided upon attainment of "annuitant status." *See* App. 43a-45a. Defendants' lead negotiator, Helmut Pekarek ("Pekarek"), articulated this promise to ENC's senior management which Pekarek intended and expected to be transmitted, in turn, to all of ENC's employees. App. 43a-44a.

With Defendants' participation, knowledge, authorization, approval and intent, ENC relayed the express promises and reassurances to ENC's employees that the employees' pension and health care benefits would remain the same after the stock sale. *See* App. 44a-51a. As in *Varity*, ENC provided Petitioners with a side-by-side comparison of the new and old benefit programs. App. 46a-48a. Indeed, the cost of these

benefits was calculated and factored into the acquisition price paid by Defendants to acquire the ENC employees and the purchase price was reduced to account for the benefits. *See* App. 43a-51a. These representations were adopted and ratified by Defendants both before and after the purchase. App. 43a-53a.

ENC communicated the promised benefits on multiple occasions. App. 45a-48a. On December 23, 1986, ENC's Employee Relations Manager, R.J. Borgmeier, the named fiduciary, distributed company-wide his memorandum announcing that:

> The company's objectives have been to maintain the current level of benefits and to make only those changes that are required to accommodate the change in shareholder. We are pleased to inform you that we have been able to accomplish this and believe that our employees will enjoy basically the same benefits as before the change in shareholder.

App. 48a. Borgmeier further represented that this ENC plan "will provide a result that, when combined with your Exxon annuity, will be equal to the annuity you would have received if you had remained in the Exxon annuity plan." App. 48a-50a. Borgmeier and his staff represented that these benefits would be provided for the employees' careers at ENC. Thus, Pekarek's promises on behalf of the new shareholder were adopted and represented by the ENC named fiduciary.

The day after ENC circulated the Borgmeier memorandum to its employees, by resolution, the ENC Board adopted the master plan which contemplated that there would be a number of additional texts. This master plan, the written Borgmeier representations and the accompanying oral representations were all made by ENC acting as a fiduciary.

In September 1991, however, Defendants reneged on the above-referenced promises, representations and guarantees and unilaterally announced that benefits would be revised effective September 30, 1991. Over the next several months, Defendants (1) reduced benefits available to employees who had attained annuitant status but elected to retire after January 1, 1992; (2) reduced benefits without option to employees who had not attained annuitant status; (3) terminated (for active employees) and reduced (for retirees) benefits available under Survivor Income Benefit Insurance; and (4) reduced and eliminated certain medical benefits that had previously been available to active employees. App. 53a-56a.

REASONS FOR GRANTING THE PETITION

This Case Should Be Resolved In Accordance With *Varity*

Petitioners pled a claim like the one recognized by this Court in *Varity*. Petitioners have pled and can articulate a claim virtually identical to the claim stated in *Varity*; the Ninth Circuit and the district court rejected Petitioners' fiduciary claim. Petitioners seek to benefit

from the Court's decision in *Varity*; however, Petitioners will not have the benefit of the decision in *Varity* unless this Court grants this Petition.

A breach of fiduciary duty claim arises where a plan fiduciary breaches statutorily-defined duties or where it issues misleading communications regarding the plan. *Varity*, 1996 WL 116994 at 10-11 ("To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act 'solely in the interest of the participants and beneficiaries.'"). A fiduciary must discharge his or her duties solely in the interest of the participants, for the exclusive purpose of providing benefits to participants, with care, skill, prudence and diligence. 29 U.S.C. §§ 1104(a), 1106. Here, Petitioners have alleged *both*. App. 44a-51a, 61a-63a.

This Court in *Varity* held that individual plan beneficiaries have a right of action under ERISA for breach of fiduciary duty. *Varity*, 1996 WL 116994 at 11. In that case, the corporate fiduciaries breached their duties of disclosure by providing incomplete, confusing, evasive and deceptive answers to the employees, including merely stating that "benefit programs will remain unchanged." *Id.* at 4, 6-7. This Court recognized plaintiffs' breach of fiduciary duty claim under ERISA for defendants' misrepresentations. *Id.* at 10. This Court reasoned that:

> [l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section

404(a)(1) of ERISA.

Id. (citation omitted). Thus, this Court's opinion in *Varity* makes it clear that the breach of fiduciary duty claims asserted here by Petitioners arise under ERISA. *Id.* at 3.

The Petition in this case should be granted and the case remanded to the court of appeals. The court of appeals should then remand for further proceedings consistent with this Court's ruling in *Varity* on the issues of fiduciary breach.

ERISA Provides A Statutory Basis For Relief For Defendants' Misrepresentations And A Direct Right Of Action For Participants Or Beneficiaries

In *Varity*, this Court now recognizes that individuals (such as Petitioners) enjoy private actions for fiduciary breaches under ERISA. *Id.* at 11. This Court granted Certiorari in *Varity* to resolve the intercircuit dispute on this issue which reverses the Ninth Circuit's rule. *Id.* at 4.

Claims under Section 1132(a)(3) contain no limitations of those subject to suit thereunder. Thus, any decision prohibiting participants and beneficiaries -- who are expressly given standing to sue -- from bringing claims under Section 1132(a)(3) against fiduciaries and alleging a breach of their fiduciary duty would run afoul of the carefully crafted and reticulated enforcement scheme, consistent with this Court's decision in *Varity*.

The remedies provided by Section 1132(a)(1) (to

recover benefits due under a plan) and Section 1132(a)(2) (which recognize a remedy running *only* to a plan) do *not* provide relief in the myriad situations in which a fiduciary commits a severe breach of the fiduciary duties established by ERISA. *Varity*, 1996 WL 116994 at 16. Petitioners, who were lured into remaining employees of the entity after the stock transfer and foregoing their rights, have a claim under Section 1132(a)(3). Indeed, Petitioners' Complaint cites this section of ERISA in their breach of fiduciary duty claim. App. 58a-62a.

Conversely, the Ninth Circuit's memorandum shows a fundamental confusion as to Defendants and their fiduciary duties to Petitioners. App. 10a-11a. Defendants, in this case, acted in a fiduciary capacity and not only in their capacity as the employer.[4]

Correspondingly, Defendants did breach their fiduciary duty as Petitioners allege. The ENC entity remained constant as it traveled through different ownership and different names. Petitioners are employees of that entity. Petitioners remained participants or beneficiaries of benefit plans sponsored by that same entity. ENC, later called ANF and SPC, was the company whose agents, including the named fiduciary,

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[4] *See Varity*, 1996 WL 116994 at 9 ("We conclude, therefore, that the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by those who had plan-related authority to do so, together provide sufficient support for the district court's legal conclusion that *Varity* was acting as a fiduciary.")

Borgmeier (who continued as Manager of Employee Relations of SPC after the stock sale), made representations relied upon by Petitioners. The name changes are not relevant to Petitioners' rights. In its capacity as a fiduciary, ENC/SPC's representations before and after the stock sale are actionable. *See* App. 43a-53a, 62a-63a. Through Defendants' subsequent adoption and ratification after the stock sale, Petitioners state a breach of fiduciary duty claim after the stock sale. Contrary to the conclusion of the district court, Petitioners alleged affirmative and material misrepresentations after the stock sale. App. 52a-53a.

In this case, the stock purchase closure date is not determinative. Likewise, changes of name and the dominant shareholder do not modify the representations' character as fiduciary representations upon which employees are entitled to rely. Thus, "Siemens" did not *become* a fiduciary as the court of appeals states in its memorandum (App. 11a.); *at all times*, ENC/SPC was a fiduciary. Representations made by a fiduciary are actionable irrespective of whether they were made before or after the stock sale.

In short, the court of appeals and district court misconstrued Petitioner's Complaint. App. 10a and 25a. The facts pled in the complaint as well as more recently discovered facts support the position that even if Defendants are not liable for their direct representations to Petitioners, they are responsible because they knowingly provided false information to ENC Management, which in turn was communicated to

Petitioners by the named fiduciary, the ENC Manager of Employee Relations. Hence, Defendants duped Petitioners into remaining with ENC after the stock sale by conveying misrepresentations through ENC, the named fiduciary during the negotiations.

Petitioners alleged in their Complaint that ENC/SPC breached its fiduciary duties under ERISA in its administrative role of communicating about the plans, consistent with this Court's ruling in *Varity*. *Varity*, 1996 WL 116994 at 3, 6, 8-10. Thus, ample facts have been pled showing that Defendants breached their fiduciary duties owed to Petitioners and other class members. App. 52a-53a, 62a-63a.

CONCLUSION

The Petition for a writ of certiorari should be granted and the case reversed and remanded for further proceedings in accordance with *Varity*.

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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. LINDENMEIER, et al.	) CA No. 94-35530) DC No. CV-93-01261-JCC
Plaintiffs-Appellants,	)
vs.	) MEMORANDUM *
SIEMENS POWER CORPORATION, et al.	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted: September 14, 1995
Seattle, Washington

Before: ALARCON, CANBY, Circuit Judges, and

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 35-3.

FITZGERALD**, District Judge.

Charles Lindenmeier, Margaret Ballard, John Lusty, Richard Nelson, and William Porath, (collectively "Plaintiffs"), on behalf of a class of employees of Exxon Nuclear Corporation ("ENC"), appeal the district court's Fed. R. Civ. P. 12(b)(6) dismissal without leave to amend their class action complaint asserting claims against ENC's successors, Siemens Power Corporation and Siemens Corporation (collectively "Siemens"). The class claims violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., federal common law, and Washington state law arising out of Siemens' elimination and reduction of their pension and welfare benefits.

The district court had jurisdiction under 29 U.S.C. § 1132 and 28 U.S.C. §§ 1331, 1337, 2201, and 2202. The Court has jurisdiction under 28 U.S.C. § 1291.

I.

Plaintiffs brought this class action on behalf of approximately 600 current and recently retired employees of defendant Siemens Power Corporation[1] who were

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** The Honorable James M. Fitzgerald, Senior U.S. District Judge for the District of Alaska, sitting by designation.

[1] Siemens Corp., a Delaware corporation, is a holding company for power generation operations located in the United States and is owned and operated by Siemens, A.G., the parent company

participants in the employee welfare and pension plan offered by ENC. On or about December 31, 1986, Siemens acquired ENC from Exxon (ENC's parent) pursuant to the terms of a stock purchase agreement.

Plaintiffs claim that Siemens expressly agreed to continue to provide ENC employees with pension and welfare benefits equal to benefits they were entitled to receive under the Exxon plan. Plaintiffs contend that Siemens provided benefits to plaintiffs, similar to those provided by Exxon, for more than five years before unilaterally altering the pension and welfare benefit package.

Siemens acknowledges that after the acquisition of ENC, Siemens continued to provide the welfare benefit plan offered by ENC until making certain changes five years later. Siemens contends, however, that the 1986 Acquisition agreement and statements made during the negotiation process with Exxon do not prohibit Siemens from changing the employees welfare benefit package.

Siemens' argument on the 12(b)(6) motion before the district court was:

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headquartered in Munich, Germany. Following the purchase of ENC by Kraftwerk Union Aktiengesellschaft ("KWU"),KWU transferred the stock of what is now Siemens Power to Siemens Capital, which ultimately merged into Siemens Corp. In or about September 1988, Siemens Corp. succeeded Siemens Capital as the sponsor and administrator of the pension and benefit plans involved in his class action.

> (1) that welfare benefits (unlike pension benefits) do not vest under ERISA, can be changed, and allegations that benefits have changed is not sufficient to state a claim upon which relief can be granted; (2) that the terms of welfare benefit plans under ERISA must be set forth in the written plan documents themselves and that oral or other informal ("ex-plan") statements about what benefits are or will be in the future, (but which are not set forth in the plan documents), cannot form the basis for a claim under ERISA, and (3) that the various state common law claims set forth in the complaint are barred by ERISA's broad preemption provision and have not been adopted as part of a new Federal common law of ERISA.

(Emphasis original). The district court agreed with Siemens and granted its 12(b)(6) motion. Plaintiffs moved for reconsideration of the dismissal of their complaint, which the district court interpreted as including a motion to amend the complaint. Those motions were denied and this timely appeal followed.

II.

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewed de novo. Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir. 1995). This court's review is limited to the contents of the complaint. Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir.

1994). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

Denial of leave to amend a complaint is reviewed for an abuse of discretion. Western Shoshone Nat'l Council v. Molini, 951 F.2d 200, 204 (9th Cir. 1991), cert. denied, 113 S.Ct. 74 (1992).

A.

Count One of the complaint asserts an ERISA claim alleging that Siemens's actions constituted violations of 29 U.S.C. §§ 1102, 1132(a)(1)(B), and 1132(a)(3). Essentially, the complaint alleges that welfare benefits vested according to the terms of the previous Exxon plan. Plaintiffs allege that Siemens agreed to provide the same benefits provided by Exxon, though this term was not included in the ERISA plan's documents, and that Siemens violated this term by reducing benefits.

Plaintiffs contended at oral argument that welfare benefits and pensions benefits were intermixed and indistinguishable, and therefore vested under the Exxon plan and that Siemens agreed to assume the Exxon vesting provisions through its acquisition agreement. The district court observed that the Siemens plan, and not the preexisting Exxon plan, was the only plan from which plaintiffs could recover. The district court relied upon Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1523-24 (9th Cir. 1993), for the proposition that informal

documents that are not incorporated into the formal plan documents will not alter the terms of the formal plan and that terms of a predecessor plan that are not integrated into the plan are not binding upon the plan. We agree completely with the district court. Informal documents, such as the acquisition agreement, will not alter the terms of a formally adopted plan. 29 U.S.C. § 1202(a)(1).

It is clearly established that welfare plans are not subject to the vesting requirements of ERISA. 29 U.S.C. § 1051(1); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90-91 (1983). "Because benefits under a welfare plan are generally neither vested nor accrued, an employer may amend or terminate benefits pursuant to the terms of the plan at any time." Cinelli v. Security Pacific Corp., 61 F.3d 1437, 1441 (9th Cir. 1995). All that is required of a reservation clause (a clause that provides a procedure for altering welfare benefits in a plan) is a statement that a company reserves the right to amend at any time. Curtiss-Wright Corp. v. Schoonejongen, 115 S.Ct. 1223, 1229 (1995). Because the Siemens plan contained such a statement, Siemens was, and is, free to alter welfare benefits. The Exxon plan also contained a reservation clause.[2] Because Exxon was free to change their plan at any time, letters by Siemens or Exxon officials attesting to maintain Exxon benefits are not relevant. Siemens, like Exxon, was free to change its plan.

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[2] "Exxon reserves the right at any time to change in any way or terminate any benefits." Exxon Nuclear Co., Inc. Wage Employees, A Guide to Your Employee Benefits, (March 1986). This reservation clause applied to unvested benefits.

Plaintiff's reliance upon Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984), is misplaced. Plaintiffs construe Bower as stating that if medical insurance constitutes a vested benefit, that benefit could not be ended without the beneficiaries' consent. Actually, the issue in Bower was whether the employees had a right to continue to receive welfare benefits beyond the termination of a collective bargaining agreement that provided for those benefits. Bower, 725 F.2d 1223. The holding in Bower was dependent upon the terms of the collective bargaining agreement and not upon ERISA or the terms of the Bower plan. The Bower decision in inapplicable to the instant case.

Count I of the complaint rests upon the terms of the Siemens plan and on ERISA. If viewed as a common law breach of contract claim, Count I is preempted by ERISA and was correctly dismissed. See Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1991), cert. denied, 504 U.S. 986 (1992). Viewed as a "federal common law" contract claim, Count I fails if it relates to an ERISA plan. It does, therefore it fails. See Lea v. Republic Airlines, Inc., 903 F.2d 624, 632 (9th Cir. 1990).

B.

One of Congress's main goals in ERISA was the replacement of state-by-state regulation of employee benefit plans with a comprehensive federal law covering such programs. This intent is expressed in Section 514(a) which states, in part: "The provisions of this title . . . shall supersede any and all state laws insofar as they may now

or hereafter relate to any employee benefit plan." The scope ERISA's preemption provision has been found "deliberately expansive" and "conspicuous for its breadth." See Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987); Gibson v. Prudential Ins. Co. of America, 915 F.2d 414, 416 (9th Cir. 1990).

The Washington Supreme Court and the Ninth Circuit are in agreement that § 518 broadly preempts state law benefit claims. Compare Cutler v. Phillips Petroleum Co., 124 Wash. 2d 749, 881 P.2d 216 (1994), cert. denied, 115 S. Ct. 2634 (1995) (claims premised on a denial of benefits under an ERISA regulated plan and therefore rightly dismissed as preempted) with Concha v. London, 1995 WL 478722, No. 93-55478, slip op. 10051, 10074 (9th Cir. Aug. 15, 1995) (claims arising from administration of an ERISA plan preempt state law).

Plaintiffs contend that Count II, a breach of contract claim, should not be preempted because it is asserted as a federal claim rather than a state law claim. This contention fails to recognize Ninth Circuit precedent. This court "has expressly refused to create federal common law causes of action under ERISA." Pacificare Inc. v. Martin, 34 F.3d 834, 836 (9th Cir. 1994). While the Supreme Court did approve of the development of a federal common law under ERISA in Pilot Life, "[t]he federal common law that the Court envisioned relates to rights and obligations under the ERISA plan and not to causes of action. . . ." Pacificare, 34 F.3d at 836, quoting Lea v. Republic Airlines Inc., 903 F.2d 624, 632 n.11 (9th Cir. 1990).

The district court relied upon Lea, a case which expressly repudiated a claim for federal common law breach of contract. We agree, Count II was rightfully dismissed.

C.

In Count III plaintiffs asserted a state law claim for breach of a third-party beneficiary contract. Plaintiffs allege that Siemens assumed Exxon's obligation to maintain certain pension and welfare agreements in the acquisition agreement. The district court declined to adopt the third-party beneficiary claim as part of the federal common law governing suits under ERISA. The district court found the claim "relates" to the benefits plan and was therefore preempted by ERISA. (E.R. 45:9-10). Id.

As we have held, the Lea decision expressly prohibited common law causes of action under ERISA. Additionally, this court has dismissed state law third-party beneficiary claims in Carpenters Health & Welfare Trust for California v. Tri Capital Corp. 25 F.3d 849, 854 (9th Cir.), cert. denied, 115 S. Ct. 580 (1994).

Even if Count Three was not preempted, the acquisition agreement expressly disavows the creation of any third-party beneficiary rights in section 14.6. For these reasons, Count Three fails.

D.

Count Four of the complaint asserted a claim for tortious denial of contract as set forth in Counts Two and Three. Count Four requires the same factual inquiry as Count Three and like Count Three, affects the terms of the benefit plan and therefore relates to the plan. For the identical reasons as in Count Three, Count Four was properly dismissed.[3]

E.

In Count Five of the complaint plaintiffs assert a common law claim for breach of fiduciary duty. A statutory remedy for breach of fiduciary duty is codified at section 404 of ERISA. A common law cause of action cannot exist given an ERISA provision specifically addressing the same issue. See Lea 903 F.2d at 632. The district court was correct in declining to recognize a common law breach of fiduciary duty under ERISA.

Count Five also asserted a claim for breach of fiduciary duty under ERISA in addition to federal common law discussed above. It is established precedent in this circuit that an employer does not act in a fiduciary capacity when deciding to amend or terminate an ERISA benefit plan. See Amalgamated Clothing & Textile Workers, AFL-CIO v. Murdock, 861 F.2d 1406, 1419 (9th

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[3] Even if Count Four was not preempted, it is not a recognized cause of action under Washington law, nor under the law relating to ERISA.

Cir. 1988); West v. Greyhound Corp., 813 F.2d 951, 955-56 (9th Cir. 1987).

In addition, plaintiffs fail to allege conduct that constitutes a breach of fiduciary duty. Plaintiffs assert Siemens made "affirmative and material misrepresentations constituting a breach of fiduciary duty." Accepting these allegations as true, they do not rise to level of a factual allegation sufficient to constitute a breach of fiduciary duty. Once Siemens became a fiduciary, as the provider of a benefit plan, they never stated that benefits would never be cut. The district court properly dismissed this claim.

F.

Counts Six and Seven of the complaint assert federal common law claims for promissory estoppel and equitable estoppel, respectively. This circuit "has recognized that federal equitable estoppel principles can, in certain circumstances, apply to some claims arising under ERISA." Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812, 821 (9th Cir. 1992). These circumstances, however, have been limited to situations in which an employee relied to his detriment on representations made with regard to ambiguous language in a benefit plan. Id. at 821-22. Plaintiffs make no claim that the Siemens plan is ambiguous. Because plaintiffs common law claim related to an ERISA-qualified employee benefits plan, and it does not fall within the narrow exception for equitable estoppel, the district court properly dismissed it. See DeVoll v. Burdick Painting, Inc., 35 F.3d 408, 412

(9th Cir. 1994), cert. denied, 115 S. Ct. 1381 (1995); Watkins, 12 F.3d at 1527-28 (rejecting a claim for damages cast as an equitable estoppel claim under ERISA).

G.

Plaintiffs Counts Eight and Nine seek declaratory and injunctive relief pursuant to 29 U.S.C. §§ 1132(A)(1) and 1132(A)(3). The district court concluded, after dismissing Counts One through Seven, that "since no 'justiciable controversy exists' in this case, and there is no otherwise appropriate equitable relief", it was necessary to dismiss Counts Eight and Nine. Under 29 U.S.C. § 1132(a)(3) equitable relief is available only to redress violations or enforce the provisions of a plan or ERISA. Mertens v. Hewitt Assoc., 113 S. Ct. 2063 (1993).

Because Counts One through Seven were properly dismissed, so too Counts Eight and Nine must be dismissed.

III.

Plaintiffs never moved for leave to amend their complaint. Nonetheless, the district court interpreted their Motion for Reconsideration as a request to amend their complaint and denied it. The district court found that plaintiffs could assert no set of facts entitling them to relief under the legal causes of action their relied upon in their complaint.

Plaintiffs contend that the basis of their claims is not the Siemens plan, but the 1986 acquisition agreement. Given that ERISA claims must be based upon the plan itself, and that their common law claims are wholly without merit, the district court did not abuse its discretion in denying leave to amend the plaintiffs' complaint. Western Shoshone Nat'l Council v. Molini, 951 F.2d 200, 204 (9th Cir. 1991), cert. denied, 113 S. Ct. 74 (1992).

IV.

The district court's grant of the dismissal under rule 12(b)(6) is AFFIRMED and the court's denial of leave to amend the complaint is also AFFIRMED.

(Filed October 24, 1995)

APPENDIX B

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. LINDENMEIER, et al.	) CA No. 94-35530) DC No. CV-93-01261-JCC
Plaintiffs-Appellants,	) ORDER
vs.	)
SIEMENS POWER CORPORATION, et al.	)
Defendants-Appellees.	)

BEFORE: ALARCON, and CANBY, Circuit Judges, and FITZGERALD,** District Judge

The petition for rehearing is DENIED.

(Filed December 22, 1995)

** The Honorable James M. Fitzgerald, Senior U.S. District Judge for the District of Alaska, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES W. LINDENMEIER, MARGARET K. BALLARD, JOAN K. LUSTY, RICHARD H. NELSON, and WILLIAM W. PORATH,	)	NO. C93-1261C
Plaintiffs,	)	ORDER ON MOTION TO DISMISS
vs.	)	
SIEMENS POWER CORPORATION (f/k/a Siemens Nuclear Power Corporation, f/k/a Advanced Nuclear Fuels Corporation, f/k/a Exxon Nuclear Company, Inc.) and SIEMENS CORPORATION	)	
Defendants.	)	

This is a class action suit brought on behalf of about 600 employees of Exxon Nuclear Corporation ("ENC")

who were participants in the employee welfare and pension benefits plan offered by Exxon Corporation (ENC's parent company), and who remained with ENC when it was acquired by defendants Siemens Power Corporation and Siemens Corporation ("Siemens"). The crux of plaintiffs' nine climes for relief is that Siemens was not free to have reduced or eliminated plaintiffs' pension and welfare benefits under ERISA and federal common law. The case is before the court on defendants' motion to dismiss all claims. After reviewing all relevant documents, hearing the parties at oral argument, and being otherwise fully informed, the court finds and rules as follows:

I. Factual Background

A. Plaintiffs' Factual Allegations

This purported class action* is on behalf of active and retired ENC employees who were participants in Exxon's employee pension and welfare benefits plan prior to Siemens' acquisition of ENC. Plaintiffs' allegations are as follows: During negotiations that led up to Siemens' acquisition of ENC, a negotiator acting on behalf of Siemens promised employees of ENC, remaining in ENC's employ after its acquisition by Siemens, that they would be guaranteed the same or equal pension and welfare benefits as those available from Exxon. On

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* By stipulation of the parties, a motion to certify the class is to be filed after this motion to dismiss is ruled upon.

December 31, 1986, Siemens consummated its acquisition of ENC. As part of the acquisition, Siemens promised to assume Exxon's pension and welfare benefit obligations that were current at the time of the ENC acquisition. Under Exxon's benefits plan, ENC employees were assured that the attainment of annuitant status not only matured or vested pension rights but also vested welfare benefits.

Siemens continued to provide plaintiffs with the same level of pension and welfare benefits that they were entitled to receive from Exxon for about five years. In September, 1991, defendants reduced certain benefits and terminated other benefits. This lawsuit ensured.

B. Defendants' Contentions

Defendants contend, inter alia, that they reserved the right at any time to change or terminate any benefits under the Siemens plan. The Siemens plan was established and effective January 1, 1987. Thus defendants assert they have not breached the terms of their plan, and are not liable for any violation under ERISA.

II. Discussion

Defendants move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all counts for failure to state a claim upon which relief can be granted. When considering a motion to dismiss, the court must presume that the allegations set fourth in the complaint are true,

and grant the motion only if it appears "beyond doubt" that plaintiffs can prove no set of facts entitling them to relief. Sun Savings & Loan Assoc. v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987). Despite defendants' referral to evidence outside the pleadings, the court will not treat the motion before the court as one for summary judgment.

A. Count One

Plaintiffs' Count One alleges a breach of plan terms in violation of 29 U.S.C. §§ 1102 and 1132. Defendants argue plaintiffs' Count One should be dismissed because (1) plaintiffs have not alleged that certain benefits are vested under the Siemens plan; (2) Siemens did not agree to abide by the vesting provisions of the Exxon plan; and (3) Siemens reserved the right to make changes to its plan.

If benefits, either pension or welfare, constitute a vested benefit under ERISA, that benefit cannot end without the pensioners' consent. Bower v. Bunker Hill Co., 725 F.2d 1221, 1223 (9th Cir. 1984. While pension benefits vest automatically under ERISA, welfare benefits vest only if the plan sponsor obligates the plan to provide such benefits as vested. In re Unisys Corporation Retirement Medical Benefits Erisa Litigation, No. 969, 1993 WL 428984 (E.D. Pa. Oct. 13, 1993).

Plaintiffs do not allege that certain welfare benefits are vested under the Siemens plan. Rather they allege that plaintiffs' welfare benefits vested under the Exxon plan, and that defendants agreed to assume the Exxon

vesting provisions through its acquisition agreement. See Complaint ¶¶ 21, 28. Plaintiffs argue that the court should determine on summary judgment whether the acquisition agreement created a vested right to welfare benefits.

The parties do not dispute that ERISA governs the Siemens plan, and that it is the only plan under which plaintiffs may recover benefits. Every employee benefit plan covered by ERISA must be established pursuant to a written instrument, with procedures outlined for amending the plan. See 29 U.S.C. § 1202(a)(1), (b)(3). A written plan is critical to ERISA's goal that employees be informed about the benefits to which they are entitled. Oral or informal written amendments are inadequate to alter the written terms of a plan. Biggers v. Wittek Industries, 4 F.3d 291, 295 (4th Cir. 1993). Accord Watkins v. Westinghouse Hanford Company, No. 91-36195, 1993 WL 535668 at *5 (9th Cir. Dec. 29, 1993) (informal documents issued that are not incorporated into the formal plan documents will not alter the terms of the formal plan, and terms of a predecessor plan not integrated into the plan are not binding on the plan). In this case, the acquisition agreement is not part of the formally adopted Siemens plan. As an "informal document," it will not alter the written terms of the Siemens plan. 29 U.S.C. § 1202(a)(1). Plaintiffs do not have a claim for breach of plan terms because plaintiffs do not allege that certain benefits are vested under the Siemens plan, and any promise made under the acquisition agreement is not part of the Siemens plan.

Plaintiffs argue that a benefit may be vested pursuant to a collective bargaining agreement. Bower v. Bunderk Hill Co., 725 F.2d 1221, 1223 (9th Cir. 1984). Bower is distinguishable from the case at hand, however, because in Bower, the court held that a collective bargaining agreement may create a vested right to benefits under § 301(a) of the National Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), not under ERISA. See Bower, 725 F.2d 1221, 1223 (9th Cir. 1984). See also International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Yard-Man, Inc., 716 F.2d 1426, 1478 (6th Cir. 1983). In contrast, the employees bring their claim under ERISA, and, unlike LMRA §301, the ERISA preemption clause is complete. Moreover, claims relating to an ERISA plan may be preempted even if ERISA provides no remedy for the clam sued upon. Olson v. General Dynamics Corp., 960 F.2d 1418, 1421 (9th Cir. 1991). Plaintiffs' claims under Count One for eliminating benefits in breach of the acquisition agreement relate to the Siemens plan and are preempted by ERISA. The lack of an ERISA remedy is not a justifiable basis for providing relief. Olson, 960 F.2d at 1421. Count One is preempted by ERISA, and must be displaced by ERISA's exclusive civil enforcement provisions, 29 U.S.C. § 1144(a). Accordingly, Count One is dismissed.

B. Count Two

Plaintiffs' Count Two states a claim for breach of contract under federal common law based on Siemens' promises to continue to provide pension and welfare

benefits "the same as or equal to the benefits available from Exxon." Complaint ¶ 48. If a state law "relates to ... employee benefit plans, it is preempted by ERISA." Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 45, 49 (1987). "Relates to" is given a common sense interpretation; i.e., ERISA preempts only those state law claims that arise out of the administration of a covered plan. Pilot Life 481 U.S. at 49. Common law contract claims that "relate to" a plan are preempted by ERISA. Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 39, 62 (1987).

Plaintiffs argue that because they allege a federal claim for relief, their claim is not preempted by the ERISA statutory scheme. They argue the Supreme Court intended to authorize a "federal common law governing ERISA" by authorizing ordinary common law claims. While the Supreme Court directed courts to develop a "federal common law of rights and obligations under ERISA-regulated plans," Pilots Life, 481 U.S. at 56, the "federal common law" the Supreme Court envisioned is for courts to uniformly construe the "rights and obligations" under the statutory scheme. It does not necessarily mean adopting all common law causes of action. In fact, a federal breach of contract claim that "relates to" an ERISA plan has been specifically rejected by Pilot Life, 481 U.S. at 49, and the Ninth Circuit. See Lea v. Republic Airlines, Inc., 903 F.2d 624, 632 (9th Cir. 1990). The Lea court expressly repudiated plaintiffs' reasoning for a federal common law breach of contract claim. Lea, 903 F.2d at 624, 632 n. 11. See also Olson v. General Dynamics Corp. 951 F.2d 1123, 1127 (1991)

(rejecting common law fraud claim). Thus the court declines to recognize a federal common law claim for breach of contract under ERISA.

Plaintiffs' breach of contract claim relates to the ERISA plan because the decision to terminate benefits arises out of the administration of the plan. Consequently, Count Two is preempted by ERISA, and must be displaced by ERISA's exclusive civil enforcement provision, 29 U.S.C. § 1144(a). Count Two is dismissed.

C. Count Three

Count Three is a state law claim for breach of a third-party beneficiary contract. Specifically, plaintiffs allege that defendants assumed Exxon's obligation to provide certain pension and welfare benefits in its acquisition agreement. Plaintiffs argue that their claim is not preempted by ERISA. They reason it does not "relate to" the employment benefit plan because the third-party beneficiary claim is made in connection with the acquisition agreement. Defendants argue the claim is preempted under ERISA because the third-party beneficiary claim necessarily requires an examination into whether Siemens provided benefits in accordance with the benefits plan.

There is nothing in ERISA that specifically authorizes participants to file suit for benefits under a third-party beneficiary breach of contract theory. Accordingly, the court must decide whether to adopt the third-party beneficiary theory into the body of federal common law

governing ERISA. The Ninth Circuit has not addressed this question. At least one court has held that a third-party beneficiary cause of action should not be adopted as part of the federal common law applied in ERISA suits. Morales v. Pan Am Life Ins. Co., 914 F.2d 83, 87 (5th Cir. 1990) (creating a federal common law of third-beneficiary claims would be inconsistent with ERISA's terms and policies). Cf. Olson v. General Dynamics Corp., 960 F.2d 1123, 1125 (9th Cir. 1991) (fraud claim preempted by ERISA where one company buys another company and changes the terms of the benefits plan because it relates to the ERISA plan). The court declines to incorporate a third-party beneficiary breach of contract theory into the federal common law governing ERISA suits.

Plaintiffs' third-party beneficiary claim relates to the benefits plan. The effect of enforcing the acquisition agreement between Siemens and Exxon would be to require Siemens to make additional payments beyond the terms of the formally adopted plan. To do so would be inconsistence with ERISA's terms and policies. Plaintiffs' cause of action under Count Three is dismissed.

D. Count Four

Plaintiffs' Count Four alleges a claim for tortious denial of contract. Plaintiffs claim they are entitled to contractual rights based on the third-party beneficiary theory of contract, and defendants' denial of the contract constitutes a tortious denial of the existence of a contract. Count Four requires the same factual inquiry as Count Three. Like Count Three, Count Four

affects the terms of the benefits plan, and thus relates to the plan. Furthermore, tortious denial of contract is a new cause of action that has yet to be recognized in federal common law governing ERISA cases by the Ninth Circuit. For the same reasons stated with regard to Count Three, the court declines to incorporate a tortious denial of contract into the federal common law governing ERISA suits, and holds that the claim relates to the plan. According ERISA preempts plaintiffs cause of action under Count Four, and it is dismissed.

E. Count Five

Count Five states a claim for breach of fiduciary duty. The Ninth Circuit has not adopted a federal common law breach of fiduciary duty under ERISA, and this court declines to do so. Plaintiffs also allege a breach of fiduciary duty under the ERISA statute. Plaintiffs allege that defendants are fiduciaries as defined by ERISA, 29 U.S.C. § 1002(21)(A). A person is a "fiduciary" if he or she performs any one of three functions: (1) exercise discretionary control over fund assets; (2) renders investment advice for a fee; and (3) exercises discretionary control in the management of the fund. 29 U.S.C. § 1002(21)(A).

A fiduciary is not liable for actions committed before he or she becomes a fiduciary. 29 U.S.C. § 1109(b). Thus any alleged misrepresentations made before defendants became fiduciaries are not covered under ERISA. Lea v. Republic Airlines, Inc., 903 F.2d 624, 631 (9th Cir. 1990) (an employer is not a fiduciary when negotiating the terms

of implementing a plan). Fiduciary standards also do not apply when a fiduciary is conducting business and not acting in its capacity as plan administrator. Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1432 (9th Cir. 1986) (fiduciary standards do not apply to an employer's business decision to implement, change or terminate a plan).

Defendants did not become fiduciaries until they exercised discretionary control over fund assets or in the management of the fund. 29 U.S.C. § 1002 (21)(A). The earliest date defendants became fiduciaries is December 31, 1986 -- the date upon which defendants acquired ENC. Since defendants were not fiduciaries in negotiations leading up to the acquisition, plaintiffs do not have a legal claim for misrepresentations made during that time. See Complaint ¶¶ 21-28.

Plaintiffs further allege that Siemens made misrepresentations about certain benefits after the acquisition. The relevant conduct alleged is,

> [T]hrough various writings disseminated to plaintiffs, defendants uniformly ratified the promises and agreement. ... Through these promises and agreement and by use of ambiguous or unclear terminology in otherwise misleading documents, defendants purposefully created an impression in the minds of plaintiffs that the agreement and promises, including the attainment of annuitant status, would not be changed or terminated by defendants. Complaint ¶ 33.

In order to establish a claim for breach of fiduciary duty in violation of ERISA, 29 U.S.C. § 1002(21)(A), plaintiffs must allege affirmative and material misrepresentations. Plaintiffs' allegations in the Complaint do not rise to the level of affirmative misrepresentations. Furthermore, plaintiffs do not allege that defendants distributed the materials knowing they intended to change or terminate certain benefits. See Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163-4 (6th Cir. 1988). Because plaintiffs fail to allege a claim for breach of fiduciary duty under ERISA, Count Five is dismissed.

F. Counts Six and Seven

Counts Six and Seven set out causes of action under promissory estoppel and equitable estoppel. Plaintiffs argue they have a cause of action under federal common law governing ERISA. The Ninth Circuit has held that a federal common law equitable estoppel-based theory can be applied to a claim under ERISA. See Greany v. Western Farm Bureau Life Ins. Co., 973 F.2d 812 (9th Cir. 1992); Ellenburg v. Brockway, Inc. 763 F.2d 1091, 1095 (9th Cir. 1985). The Ninth Circuit has added two additional prerequisites to the availability of the theory of equitable estoppel in ERISA cases. Greany, 973 F.2d at 821. Pursuant to Greany, a federal common law claim of equitable estoppel will be available only where "(1) the provisions of the plan at issue are ambiguous such that reasonable persons could disagree as to their meaning or effect, and (2) representations are made to the employee involving an oral interpretation of the plan." (citing Kane

v. Aetna Life Ins., 893 F.2d 1283 (11th Cir.), cert. denied, 111 S.Ct. 232 (1990). The Greany court reasoned that a plaintiff cannot avail himself of a federal ERISA estoppel claim based upon statements of a plan employee which would enlarge his rights against the plan beyond what he could recover under the unambiguous language of the plan itself.

Plaintiffs do not allege that the provisions of the Siemens plan are ambiguous. Nor do they allege that the "ambiguous writings" distributed are part of the formally adopted plan. Rather plaintiffs allege that various informal documents distributed to plaintiffs were ambiguous. See Complaint ¶¶ 31-33. Plaintiffs also do not allege any oral interpretations of the Plan documents were made. Thus plaintiffs fail to meet the two prerequisites necessary to establish a cause of action under a theory of estoppel in federal common law governing ERISA. Since plaintiffs do not meet either of the prerequisites set out in Greany, the court need not address whether plaintiffs meet the four elements set forth in Ellenburg, 763 F.2d at 1096. Accordingly, plaintiffs' Count Six and Seven are dismissed.

G. Counts Eight and Nine

Counts Eight and Nine set forth claims for declaratory and injunctive relief under 29 U.S.C. §§ 1132 (A)(1) and 1132 (A)(3) to enforce any provisions of ERISA or to obtain other appropriate equitable relief. Since no "justiciable controversy exists" in this case, and there is no otherwise appropriate equitable relief, Counts Eight and

Nine are dismissed. See International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas, 646 F.2d 1211, 1214 (7th Cir.), cert. denied, 454 U.S. 866 (1981).

III. Conclusion

Based on the foregoing, defendants' motion to dismiss all counts is GRANTED. Plaintiffs' motion for class certification is STRICKEN as moot.

The Clerk of this Court is directed to enter judgment in accordance with this Order, and to send copies of this Order and the judgment to all counsel of record

DATED this 4 day of February, 1994.

/s/John C. Coughenour
John C. Coughenour
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES W. LINDENMEIER, et al.	CAUSE NO. C93-1261C
Plaintiffs,	JUDGMENT ON DECISION BY THE COURT
vs.	
SIEMENS POWER CORPORATION, et al.	
Defendants.	

This action came on for consideration before the court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED defendants' motion to dismiss all counts is GRANTED.

DATED this 4th day of February, 1994.

[sgnd] Donna Smith
Deputy Clerk of Court

(Entered February 4, 1994)

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES W. LINDENMEIER, MARGARET K. BALLARD, JOAN K. LUSTY, RICHARD H. NELSON, and WILLIAM W. PORATH,	)	NO. C93-1261C
Plaintiffs,	)	ORDER ON MOTION FOR RECONSIDERATION
vs.	)	
SIEMENS POWER CORPORATION (f/k/a Siemens Nuclear Power Corporation, f/k/a Advanced Nuclear Fuels Corporation, f/k/a Exxon Nuclear Company, Inc.) and SIEMENS CORPORATION	)	
Defendants.	)	

Plaintiffs move the court to reconsider its February 4, 1994 order on plaintiffs' motion to dismiss. Plaintiffs'

request for oral argument is denied.

Plaintiffs' motion for reconsideration makes many claims, all of which are without merit. The court will deny motions for reconsideration absent showing of manifest error in the prior ruling, or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence. Local Civil Rule 7(e)(1).

Plaintiffs first argue the court erroneously concluded that they failed to allege Siemens had eliminated vested benefits under the Siemens plan. The court does not dispute that plaintiffs alleged Siemens had terminated certain benefits. Complaint ¶¶ 34-41. Rather, the court found plaintiffs failed to plead that any of the alleged eliminated benefits were vested under the Siemens plan.

As the court previously made clear, informal documents, or side agreements such as the acquisition agreement, are not part of the formally adopted Siemens plan. The court found ¶ 32-33 of the complaint alleged the existence of "informal" documents. Such informal documents, even if misleading, do not form the basis for a legal claim under ERISA. See Order at 5-6. Plaintiffs' insertion of the word "[plan]" in its quotation of the complaint does not alter the court's previous ruling.

Plaintiffs further argue the court erroneously applied the law to dismiss Count One. Specifically, plaintiffs assert that Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984), is not limited to National Labor Management

Relations Act ("LMRA") cases, and Count One cannot be preempted by ERISA.

The Ninth Circuit in Bower held that a collective bargaining agreement may create a vested right to benefits. This court concluded that in Bower, the employees' claims were brought pursuant to § 301 of the LMRA. This reading is supported by the district court's opinion, Bower v Bunker Hill Co., 675 F. Supp. 1263 (E.D. Wash. 1986), and the Sixth Circuit opinion upon which the Ninth Circuit relied, International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Yard-Man, Inc., 716 F.2d 1426, 1478 (6th cir. 1983). Nowhere in the Bower decision does the court state that the claims were brought under ERISA. Furthermore, the mere fact that the Bower court looked to extrinsic evidence of an ERISA-mandated booklet to determine ambiguous terms of the collective bargaining agreement does not show, as plaintiffs assert, that the claims were brought under ERISA. The court correctly distinguished Bower v. Bunker Hill Co. from the case at hand and other Ninth Circuit authority. See, e.g., Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1991), cert. denied, 112 S.Ct. 2968 (1992).

The court also did not erroneously conclude that Count One is preempted by ERISA. The court held that Count One failed to state a claim for breach of plan terms under 29 U.S.C. §§ 1102 and 1132(a)(1)(B). The court further added that to the extent Count One alleges a breach of an acquisition agreement extrinsic to the Siemens plan, the common law breach of contract claim

"relates to" the ERISA plan, and therefore is preempted by ERISA.

Plaintiffs assert that Siemens' termination of certain welfare benefits is contrary to the plan terms and violates defendants' fiduciary duty under ERISA. Plaintiffs' continued assertion that Siemens violated the terms of its benefits plan is simply not alleged in the complaint. Despite plaintiffs' fatal flaw, they ask the court to reconsider the sufficiency of their allegations to support a breach of fiduciary duty claim in Count Five. Plaintiffs do not present new facts or legal authority that persuades the court to alter its previous judgment. Plaintiffs point to Complaint ¶¶ 3-4 for support. Complaint ¶¶ 3-4 allege that defendants terminated certain benefits in contradiction to promises made to plaintiffs and in violation of the acquisition agreement. As the court previously held, defendants do not have a fiduciary duty under ERISA to maintain the terms of the acquisition agreement, or to adhere to promises made in negotiations leading up to the adoption of the ERISA plan. See Order at 11-13. Thus the court correctly dismissed Count Five of plaintiffs' complaint.

Finally, plaintiffs argue the court committed manifest error and abused its discretion by denying plaintiffs an opportunity to amend its complaint. Plaintiffs never made a motion to amend its complaint. Nevertheless, the court construes plaintiffs' motion for reconsideration to include a motion to amend its complaint. The court finds that plaintiffs can prove no set of facts entitling them to relief under the legal causes of action set forth in the complaint.

Plaintiffs argue they would have a legal cause of action if allowed to replead. Specifically, plaintiffs seek to allege that the terms of the plan regarding notice of the right to terminate or amend certain benefits are ambiguous. The court finds that the plan's reservation clause states that previously unvested benefits shall vest in the event of plan termination. This clause does not apply to the facts alleged by plaintiffs since they make no allegation that the Siemens plan has been terminated. Furthermore, the court finds that the reservation clause is not ambiguous.

In sum, plaintiffs' motion for reconsideration is DENIED.

The Clerk of this Court is directed to send copies of this Order to all counsel of record.

DATED this 27 day of April, 1994.

/s/John C. Coughenour
John C. Coughenour
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHARLES W. LINDENMEIER, MARGARET K. BALLARD, JOAN K. LUSTY, RICHARD H. NELSON AND WILLIAM W. PORATH,	)	Case No.
	)	COMPLAINT - CLASS ACTION
	)	**COMPLAINT FOR VIOLATIONS OF ERISA, FEDERAL COMMON LAW AND STATE LAW SEEKING DECLARATORY AND INJUNCTIVE RELIEF, DAMAGES AND LOST BENEFITS**
Plaintiffs,	)	
vs.	)	
SIEMENS POWER CORPORATION (formerly Exxon Nuclear Company, Inc., Advanced Nuclear Fuels Corporation, Siemens Nuclear Power Corporation); AND SIEMENS CORPORATION,	)	JURY DEMAND
Defendants.	)	

Plaintiffs, by counsel, on behalf of themselves and all others similarly situated, bring this Class Action against defendants (Siemens Power Corporation and Siemens

Corporation) seeking all appropriate legal, equitable, declaratory, and other relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461, Federal Common Law and State Law. Plaintiffs allege upon information and belief, except as to those allegations pertaining to plaintiffs themselves, as follows:

NATURE OF ACTION

1. This Class Action is brought pursuant to Fed. R. Civ. P., Rule 23 on behalf of approximately six hundred (600) hourly and salaried, non-union, active and retired employees (who retired on or after January 1, 1992), who were participants (along with their beneficiaries) in the employee pension and welfare benefits that were provided by Exxon Corporation ("Exxon") to the then employees of Exxon Nuclear Company, Inc. ("ENC") on December 31, 1986, who remained employees of said ENC when it was sold to the defendants effective January 1, 1987. These benefits were guaranteed to be provided to said employees ("the Class members") by the defendants in consideration for the Class members remaining employed at ENC after its sale by Exxon. This Class action seeks (a) declaratory, injunctive and other appropriate equitable relief to ensure that defendants provide the benefits they promised plaintiffs and the members of the Class; and (b) damages to compensate plaintiffs and the members of the Class for monetary injury caused by defendants' statutory and common law violations detailed herein.

2. Plaintiffs and members of the Class sued for herein were career employees of ENC when ENC was acquired by defendants on or about December 31, 1986. Pursuant to a direct contractual promise made to plaintiffs and under the acquisition agreement hereinafter described, defendants promised and agreed to provide the same or equal pension and welfare benefits as Exxon's benefits at the time of the acquisition.

3. After the acquisition of ENC, defendants provided and plaintiffs accepted benefits that were the same or equal to those provided by Exxon prior to the acquisition. Historically, Exxon never reduced or terminated any benefits and in fact, increased its pension six (6) times over twelve (12) years to accommodate cost of living increases.

4. Defendants then reneged upon their obligations and announced the unilateral elimination of and reductions in certain of plaintiffs' benefits. As described hereinafter, defendants' elimination and reduction of pension and welfare benefits violate the direct promises and agreements made to plaintiffs, the acquisition agreement described infra, Federal Common Law, ERISA, and State Law.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this Class Action pursuant to 29 U.S.C. §1132 and 28 U.S.C.
§§1331, 1337, 2201 and 2202.

6. This Court also has supplemental jurisdiction over the State Law claims pursuant to 28 U.S.C. §1367(a) because those claims are transactionally related to other claims in this action that are within this Court's original jurisdiction and they form a part of the same case or controversy under Article III of the United States Constitution.

7. Venue is properly laid in this District pursuant to 28 U.S.C. §1391(c) and 29 U.S.C. §1132(e)(2) because (a) a controversy exists arising under ERISA, 29 U.S.C. §1332; (b) there exists a controversy arising under the laws of the United States, 28 U.S.C. §1331; (c) a controversy exists between plaintiffs and the members of the Class on the one hand, and defendants on the other hand, which is ripe for adjudication pursuant to 28 U.S.C. §2201 et seq.; (d) one or more of the defendants are found within this District and are doing business here; (e) many of the acts alleged herein, including violations of ERISA, occurred in this District; and (f) no amount in controversy is required under 28 U.S.C. §1332.

PARTIES

8. (a) Plaintiff Charles W. Lindenmeier is a salaried, non-union, active employee of Siemens Power Corporation. Mr. Lindenmeier was a salaried, non-union, active employee of ENC on December 30, 1986. Mr. Lindenmeier is a participant in defendants' employee pension and welfare benefit plans.

(b) Plaintiff Margaret K. Ballard, is a

retired employee (salaried, non-union) of Siemens Power Corporation. She retired on or about March 31, 1992. Ms. Ballard was a salaried, non-union, active employee of ENC on December 30, 1986. Ms. Ballard is a participant in defendants' employee pension and welfare benefit plans.

(c) Plaintiff Joan K. Lusty is a salaried, non-union, active employee of Siemens Power Corporation. Ms. Lusty was a salaried, non-union, active employee of ENC on December 30, 1986. Ms. Lusty is a participant in defendants' employee pension and welfare benefit plans.

(d) Plaintiff Richard H. Nelson is a salaried, non-union, active employee of Siemens Power Corporation. Mr. Nelson was a salaried, non-union, active employee of ENC on December 30, 1986. Mr. Nelson is a participant in defendants' employee pension and welfare benefit plans.

(e) Plaintiff William W. Porath is a salaried, non-union, active employee of Siemens Power Corporation. Mr. Porath was a salaried, non-union, active employee of ENC on December 30, 1986. Mr. Porath is a participant in defendants' employee pension and welfare benefit plans.

9. Defendant Siemens Power Corporation ("SPC"),is a Delaware corporation, with its principal place of business in the State of New York. On or about October 1, 1992, SPC was created as the successor to all

of the interests and obligations of ENC. ENC has headquarters in Bellevue, Washington. SPC was previously called Advanced Nuclear Fuels Corporation and then Siemens Nuclear Power Corporation. SPC was at different times a wholly-owned subsidiary of Siemens Corporation, Siemens Capital Corporation and Siemens KWU, Inc.

10. Defendant Siemens Corporation ("SC") is a Delaware corporation with its principal place of business in the State of New York. SC is a holding company for power generation operations in the United States owned or operated by Siemens AG, the parent company in Munich, Germany. Following the purchase of ENC by Kraftwerk Union Aktiengesellschaft ("KWU"), KWU transferred the stock of what is now Siemens Power Corporation to Siemens Capital Corporation which ultimately merged into SC. In or about September, 1988, SC succeeded Siemens Capital Corporation as the sponsor and plan administrator of the Plans involved in this Class Action within the meaning of §316 of ERISA, 29 U.S.C. §1002(16).

CLASS ACTION ALLEGATIONS

11. Plaintiffs bring this action as a Class Action which meets all of the requirements of Fed. R. Civ. P., Rule 23(a) and (b) and is properly maintainable as a class action under Rules 23(b)(1), 23(b)(2), and/or 23(b)(3).

12. Plaintiffs bring this Class Action on behalf of a Class consisting of all persons who were hourly or

salaried, non-union, active employees of ENC on December 31, 1986, who continue to be hourly or salaried, non-union, active employees of SPC and all those who have retired from SPC on or after January 1, 1992.

13. The members of the Class are so numerous that joinder of all of them is impracticable. The exact number of Class members is unknown to plaintiffs; however, on January 1, 1992, there were approximately six hundred (600) salaried, non-union, active and retired employees of SPC affected by defendants' actions detailed herein.

14. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) Whether defendants' actions and anticipated actions violate the rights of plaintiffs and the members of the Class under the pension and welfare benefit plans, ERISA, Federal Common Law and State Law; and

(b) Whether plaintiffs and the members of the Class have sustained injury by reason of defendants' actions.

15. Plaintiffs are members of the Class and their claims are typical of the claims of the members of the Class.

16. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel who are competent and experienced in class action and ERISA litigation. Plaintiffs do not have interests that are antagonistic to or in conflict with those whom they seek to represent as Class representatives.

17. Class certification is appropriate under Rule 23(b)(1) because individual litigation will, as a practical matter, be dispositive of the interests of all members of the Class and, under Rule 23(b)(2) insofar as defendants have acted on grounds generally applicable to the Class, making appropriate declaratory, injunctive and other equitable relief on a Class-wide basis.

18. If necessary, class certification also would be appropriate under Rule 23(b)(3). A Class Action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable. Furthermore, the expense and burden of individual litigation makes it impracticable for the members of the Class to pursue individual litigation in order to vindicate their rights. Plaintiffs are not aware of any problems that would militate against the maintenance of this action as a Class Action.

FACTUAL ALLEGATIONS

19. In or about June 1986, representatives of defendants, headed by lead negotiator Helmut Pekarek ("Pekarek"), met in London with representative of ENC to

negotiate KWU's purchase of ENC from Exxon. Defendants concluded and acknowledged that retaining ENC's employees and maintaining ENC employee morale both through the transition and into the future were crucial to avoiding a mass exodus of personnel and the ultimate success not only of the acquisition, but also of the acquired company. The parties entered into a Memorandum of Understanding and agreed to initiate due diligence reviews and exchange information necessary to facilitate the corporate transaction, including pension and welfare benefit information.

20. On or about August 12, 1986, a meeting was held at the Westin Hotel in Seattle, Washington, attended by ENC, Exxon and defendants' personnel during which Pekarek articulated defendants' terms to ENC's senior management which Pekarek intended and expected to be transmitted, in turn, to all ENC employees. Pekarek's authority to act on behalf of defendants was confirmed in a personal letter from Wolfgang Keller, a member of the Siemens Board of Directors, to ENC's President, which contained assurances that Pekarek had complete and express authority to act on behalf of defendants.

21. During that meeting, Pekarek promised that employees of ENC who remained employed at ENC following its acquisition by defendants would be guaranteed the same or equal pension and welfare benefits as those available from Exxon. Pekarek gave assurances that defendants respected ENC's employees and that all employees would be retained in their current assignments. Included in these representations was a

further promise that the attainment of "annuitant status" for purposes of vesting pension and welfare benefits would be identical with defendants and at Exxon, which was fifty-five (55) years of age and fifteen (15) years of employment. Pekarek relayed that promise through a handwritten outline projected on overhead Vugraph charts, highlighting defendants' reasons for the acquisition, prospects and goals; under the category "Employee Relations," Pekarek outlined how defendants' pension and welfare benefits would replicate Exxon's benefits.

22. In or about the Fall of 1986, the parties conducted their respective due diligence reviews and valuations of the assets and liabilities to be transferred from ENC to defendants, including plant inventory and the employee pension and welfare benefits. Defendants engaged Boston Consulting and other outside consultants which concluded that retaining ENC's talented employees was crucial to the success of the transaction and, further, that the acquisition should not be made unless retention of ENC's sophisticated work force could be accomplished.

23. While due diligence reviews were being conducted, ENC informed Pekarek that it had discovered that his promise to provide transferring ENC employees with the same or equal benefits as Exxon's was not being factored into valuations calculated by Siemens Capital Corporation, which was responsible for KWU's due diligence. ENC requested that Pekarek's promise be factored into the valuation equation; Pekarek assured ENC that corrections would be made and they were, in fact, incorporated by defendants.

24. This promise was reflected in an ENC "Update" memorandum dated December 23, 1986, which provided ENC employees with a "Status Report" on "Discussions with Kraftwerk Union," which stated that "[o]ur prospective new shareholder has declared its intention to continue current employment conditions with continuity of service and benefit programs comparable to those presently enjoyed by our employees. Your managers and supervisors are planning to discuss this transition with you in more detail. . . ." This memorandum was sent to plaintiffs and members of the Class with the prior approval and authorization of defendants.

25. During December 1986, defendants' promise and agreement guaranteeing pension and welfare benefits was conveyed through ENC Employee Relations personnel by coordinated authorization of defendants' and ENC's senior management to all ENC employees. In a series of meetings designed to ensure that every employee understood that their job security and pension and welfare benefits were assured, plaintiffs and the members of the Class were shown typewritten but more detailed Vugraph charts dated December 15, 1986, which were similar to the above-referenced handwritten versions. Representations made during meetings held in conjunction with the Vugraph charts promised plaintiffs and members of the Class, for example, that the criteria for attaining annuitant status would be identical as both ENC and Exxon and that both Family Adjustment Insurance and Family Income Insurance would be coordinated with pension benefits. The Vugraph charts, exemplified in pertinent part below, were used to highlight

defendants' promise and agreement that pension and welfare benefits would replicate Exxon's after the acquisition:

BENEFITS PROGRAMS

- OBJECTIVES
  MAINTAIN CURRENT PLAN OPTIONS
  MINIMIZE PLAN CHANGES

- RESULTS
  IDENTICAL / COMPARABLE BENEFITS
  IDENTICAL EMPLOYEE COSTS
  ENHANCEMENTS TO SOME PROGRAMS
  TWO NEW PROGRAMS

ANNUITY PLAN

- ALL EMPLOYEES COVERED UNDER ONE
  PLAN

- SERVICE CREDITS WITH ENC FULLY RECOGNIZED FOR ANNUITY VESTING
  TOTAL ANNUITY IDENTICAL
  EMPLOYEES KEPT "WHOLE"

* * *

MAJOR MEDICAL BENEFIT PLAN

- NO CHANGE IN PROVISIONS

- BLUE CROSS SHALL REMAIN AS CARRIER.

DENTAL PLAN

- CURRENT PLAN - TRAVELERS
- NEW PLAN - CONNECTICUT GENERAL
  NO CHANGE IN PROVISIONS

* * *

FAMILY ADJUSTMENT

- NO CHANGE IN PROVISIONS

* * *

- COORDINATION OF BENEFITS
  PROVIDED FOR ANNUITANTS

FAMILY INCOME

- NO CHANGE IN PROVISIONS

* * *

- COORDINATION OF BENEFITS
  PROVIDED FOR ANNUITANTS

* * *

26. The promise and agreement that there would be "no change in provisions" for virtually all benefits, except for the Employee Stock Ownership Plan (ESOP) which would be discontinued under the Tax Reform Act of 1986, was again confirmed in a December 23, 1986, memorandum from ENC's Employee Relations Manager, R. J. Borgmeier ("Borgmeier"), and distributed to all ENC employees. That memo announced that

> "[t]he Company's objectives have been to maintain the current level of benefits and to make only those changes that are required to accommodate the change in shareholder. We are pleased to inform you that we have been able to accomplish this and believe that our employees will enjoy basically the same benefits as before the change in shareholder."

27. The Borgmeier memorandum further confirmed this promise because it itemized and compared Exxon's benefits to what defendants were going to offer in the following terms:

> Annuity Plan
> Effective January 1, 1987 you will become a participant in a new Annuity Plan which will provide a similar benefit program. The new plan will recognize past service with Exxon and Exxon Nuclear for annuity purposes. It will also produce a result that, when combined with your Exxon annuity, will be equal to the annuity you would have received if you had remained in the Exxon Annuity Plan.

Thrift Plan

The Company has established a savings plan that largely duplicates the features of Exxon's Thrift Plan. For example, the Company will match employee contributions of 6% of base salary.

* * *

Medical and Dental Benefits

The Company's existing contract with the Blue Cross Plan will continue and your current insurance coverage will be unaffected.

The dental Plan provision will remain the same. The new carrier will be Connecticut General.

Insurance Programs

New plans have been established to provide you with essentially the same coverages you enjoyed while participating in Exxon Plans. These are outlined below:

Insurance Coverage	New Plan
Family Adjustment	Same Coverage
Family Income	Same Coverage
Contributory Group Life	Option: Similar/Same Coverage
Accidental Death & Dismemberment	Expanded to nonoccupational as well as occupational coverage
Personal Accident	New (Optional)
Business Travel Accident	Expanded to cover all

	modes of travel (Replaces Aviation Accident)
Disability	
Short-Term	Same Coverage
Short-Term	Similar Coverage
Other	
Vacations, Holidays	Same
Service Credits	Same
Payroll Deductions for IRA's, Savings Bonds	Same
EHAP	Same
Education Refund Program	Same

* * *

28. Defendants promised and agreed to assume Exxon's pension and welfare benefits that were current at the time of the ENC acquisition. Under Exxon's benefits, ENC employees were assured that the attainment of annuitant status not only matured or vested pension rights but also vested welfare benefits.

29. The ENC acquisition was consummated on December 31, 1986. The defendants' acquired ninety percent (90%) of ENC's stock together with all voting rights; the remaining ten percent (10%) being transferred two years later. Prior to closing of the acquisition, defendants analyzed the future cost of pension and welfare benefits for the employees and, based on defendants' analyses, defendants negotiated with Exxon an

adjusted acquisition price that accommodated these obligations. In fact, the greater then originally anticipated cost of guaranteeing these benefits to existing employees was a factor in reducing defendants' payment for ENC. Defendants expressly agreed to provide the same (or equal) pension and welfare benefits as Exxon's for the benefit of plaintiffs and members of the Class. Common stock in ENC was transferred at a reduced price to defendants in order to accommodate defendants' projected costs for maintaining the same (or equal) pension and welfare benefits. After the acquisition, ENC's name was changed to Advanced Nuclear Fuels Corporation ("ANF") and, in 1991, it was changed to Siemens Nuclear Power Corporation ("SNP"). In October 1992, SNP was renamed Siemens Power Corporation ("SPC").

30. As promised and agreed, plaintiffs and members of the Class were provided with pension and welfare benefits that were the same as (or equal to) Exxon's as though they continued to work for ENC and continued to be covered by the Exxon benefit packages. They were also credited for their years of employment at ENC for purposes of attaining annuitant status (55 years of age and 15 years of employment). Defendants honored these promises for almost five (5) years until the changes described herein were announced.

31. The promises and agreement to plaintiffs and members of the Class were reiterated and ratified in a December 31, 1990, memorandum "From the President" of ANF in which R. Baird Stephenson ("Stephenson"), a

former Vice President and member of ENC's Board of Directors, stated:

> "ANF's employees are the Company's most important asset. Your talents and efforts enable the Company to meet its goal of growth and profitability. In return for your efforts, ANF seeks to provide its employees rewarding career opportunities, competitive salaries, and excellent benefits. The company has a program of individual benefits plans to aid you and your family in times of personal difficulty, such as illness, and to help you prepare for retirement. I believe our benefits program is one of the finest anywhere. I urge you to review carefully the information contained in this report and to share it with your family so that they, as well as you, are aware of the Company's commitment to your future financial security. Sincerely, \s\ R. B. Stephenson"

32. Defendants' intent to honor the agreement and promises was again ratified almost five (5) years later in an August 1991, SNP booklet entitled "Highlights of Your Employee Benefits," which summarized and demonstrated that plaintiffs' pension and welfare benefits had remained unchanged since the acquisition. This was also consistent with their benefits, as described to ENC employees in the December 23, 1986, Borgmeier memorandum previously described.

33. Through these various writings disseminated to plaintiffs and the members of the Class, defendants uniformly ratified the promises and agreement, as given in consideration of plaintiffs' and members of the Class' employment after ENC's acquisition by defendants and for their continued labor. Through these promises and agreement and by use of ambiguous or unclear terminology in otherwise misleading documents, defendants purposefully created an impression in the minds of plaintiffs that the agreement and promises, including the attainment of annuitant status, would not be changed or terminated by defendants.

34. In or about September 1991, defendants reneged upon their guarantees made to ENC's employees who had remained with the company after its acquisition by defendants. SNP announced that benefits would be revised effective September 30, 1991. According to the announcement, an active employee who had or would attain annuitant status (55 years of age or older with 15 years of employment) by December 31, 1991, had to elect to retire on or before January 1, 1992 and failure to do so resulted in receiving "revised benefit plans." In effect, active employees retiring after that date would be eligible for reduced benefits and retirees would no longer receive the same benefits as active employees. Employees who had not yet attained annuitant status were offered no retirement option; even forced, early retirement would not preserve for them the promised Exxon level benefits.

35. All potential participants in "current retiree benefits," including plaintiffs and the members of the

Class, were only offered a "one-time opportunity" to elect retirement and they had less than one month to read and review the new replacement benefit programs.

36. Effective September 30, 1991, Survivor Income Benefit Insurance (SIBI) was terminated for active employees. This was SNP's equivalent to ENC's Family Income Insurance which was a coordinated annuity benefit and the coordinated five-year certain annuity was changed to a simple annuity. For retirees, the medical deductible was doubled compared to active employees, only 80% of expenses was covered rather than 100%, and life insurance was reduced to a maximum of $20,000.

37. Defendants' stated rationale for these revisions was that "[t]he cost of providing benefit programs for employees, retirees, and members of their families continues to increase at an alarming rate. In addition, new accounting rules are changing the way companies must account for the cost of retiree health and life insurance programs."

38. In November 1991, SNP announced that medical coverage for active employees would be revised as well. Effective January 1, 1992, deductibles were increased and 100% coordinated benefits (between the SNP plan and another medical plan for employees and dependents) were decreased or eliminated. 39. In a letter dated November 27, 1991, SNP Director of Employee Relations George B. Mathison informed his "Fellow Employee[s]" that the revisions were necessary because

"Health care expenses continue to rise at an alarming rate! . . . No company is immune . . . SNP is certainly no exception since it pays 100% of the employee's medical premium and 85% of the premium for dependant coverage . . . SNP has managed to hold employee premiums steady since 1989. However, without any changes, the Company's cost for medical benefits would be expected to increase about $500,000 in 1992. Clearly, the Company cannot continue to absorb these levels of cost increases."

40. By letter dated December 31, 1991, one year after addressing employees as "the Company's most important asset," defendants' attitude towards providing promised benefits changed dramatically, as exemplified in SNP President Stephenson's letter stating:

"Change. It's the one thing that's constant in our lives. And it affects the Company as well. Each day, SNP's employees are challenged by change -- change in the ways we generate products and services for our customers, change that has a financial impact on the Company and change that has an impact on each of us.

As you are well aware, change has recently come to SNP's benefits program. Because of continually increasing expenses associated with our benefit plans and the Company's ability to absorb those increased costs, certain changes were necessary. And those benefit changes are

included in this report.

Although future benefit plan changes remain a possibility, one thing that won't change is the Company's commitment to providing a comprehensive and affordable benefits program for its employees . . . ."

41. Plaintiffs are informed and believe that defendants may have made other revisions to the pension and welfare benefits in breach of their aforementioned promises and agreement. Moreover, defendants intend to make further revisions to the pension and welfare benefits in breach of their promises and agreement that such benefits would remain the same or equal to benefits offered by Exxon.

42. At no time were plaintiffs or the members of the Class notified that defendants reserved any right to modify or terminate any benefits. To the extent that defendants attempted to reserve the right to change or terminate any benefits, those attempts were obscured and negated by numerous acts and communications, by ambiguous language used by defendants and by the lack of clarity and prominence of any such attempts to reserve any such rights in written materials distributed to plaintiffs and members of the Class.

43. The written materials provided to plaintiffs and the members of the Class did not describe any specific internal remedy or appeal procedure in the event of modification or termination of any benefits. Since in or

about September 1991, defendants have unequivocally announced their intent to and have implemented the modification and termination of benefits and these decisions are not subject to reconsideration or reversal by defendants. In or about August 1992, the Seattle law firm of Short Cressman & Burgess, acting on behalf of plaintiffs and the members of the Class, made a written request that the guaranteed benefits be restored; the request was denied. Plaintiffs made a similar personal appeal to SPC's Compensation Committee; that request was also denied. As a consequence of defendants' refusal to restore benefits, any further attempts to seek review of their unequivocal decision to modify and terminate benefits would be futile.

44. The net effect of these revisions has been a significant reduction in both future pension and current and future welfare benefits. The terms, conditions and timing of the revisions beginning in September 1991 to the "current benefit plans," in addition to the brief time period within which active employees were allowed to elect retirement, has caused plaintiffs and members of the Class to suffer irreparable harm.

COUNT ONE
(Breach of Plan Terms)

45. Paragraphs 1 through 44 of this Complaint are realleged and incorporated by reference.

46. Defendants' actions alleged herein regarding the reduction and elimination of pension and welfare

benefits that were to be the same as or equal to Exxon's constitute continuing violations of 29 U.S.C. §§1102, 1132(a)(1)(B), and 1132(a)(3), as set forth herein. As a result of defendants' wrongdoing, plaintiffs and members of the Class have suffered and continue to suffer serious damages and irreparable injuries including, but not limited to, loss and denial of benefits, financial injury, emotional distress and extracontractual damages in an amount according to proof at trial.

COUNT TWO
(Breach of Contract)

47. Paragraphs 1 through 46 of this Complaint are realleged and incorporated by reference.

48. Under ERISA, 29 U.S.C.§1132, and principles of Federal Common Law developed thereunder, defendants are obligated to fulfill their contractual promises to provide the same (or equal) pension and welfare benefits as Exxon's to plaintiffs and the members of the Class insofar as defendants made direct promises and agreement at the August 12, 1986, and December 1986 meetings authorized by defendants, as described herein.

49. By continuing with defendants' company, and by rendering full performance under those bilateral contracts, plaintiffs and the members of the Class fully and completely performed all covenants and conditions required to be performed by them.

50. By failing and refusing to provide the same (or equal) pension and welfare benefits as Exxon's, to which plaintiffs and the members of the Class are now entitled, defendants are in breach of their bilateral contracts with plaintiffs and the members of the Class and are in violation of ERISA and Federal Common Law.

51. As a result of defendants' breach of such bilateral contracts, plaintiffs and the members of the Class have suffered, and are continuing to suffer, serious damages and irreparable injuries including, but not limited to, loss and denial of benefits, financial injury, emotional distress and extracontractual damages in an amount according to proof at trial.

COUNT THREE
(Breach of Third Party Beneficiary Contract)

52. Paragraphs 1 through 51 of this Complaint are realleged and incorporated by reference.

53. Defendants are obligated to fulfill their contractual promises to provide the same (or equal) pension and welfare benefits as Exxon's to plaintiffs and the members of the Class because, by the terms of the acquisition agreement (as construed by its terms as a whole and in light of the circumstances in existence at the time), defendants agreed to assume a direct obligation to plaintiffs and the members of the Class as described herein, which constituted a third-party beneficiary contract between defendants and plaintiffs and the members of the Class.

54. By continuing employment with ENC after its purchase by defendants, and by rendering full performance under those contracts, plaintiffs and the members of the Class fully and completely performed all covenants and conditions required to be performed by them.

55. By failing and refusing to provide the same (or equal) employee pension and welfare benefits as Exxon's, to which plaintiffs and the members of the Class are entitled, defendants are in breach of their contract with plaintiffs and the members of the Class and have violated State Law.

56. As a result of defendants' breach of such contract, plaintiffs and the members of the Class have suffered, and are continuing to suffer, serious damages and irreparable injuries including, but not limited to, loss and denial of benefits, and financial injury in an amount according to proof at trial.

COUNT FOUR

(Tortious Denial of Existence of Contract In Bad Faith and Without Probable Cause)

57. Paragraphs 1 through 56 of this Complaint are realleged and incorporated by this reference.

58. When plaintiffs and other members of the Class, as intended third-party beneficiaries of the acquisition agreement aforementioned, attempted to

enforce defendants' agreement to provide the same (or equal) employee pension and welfare benefits as Exxon's, defendants denied that these contractual rights existed. Defendants' denial of the existence of these contractual rights was an attempt by defendants to avoid all liability to plaintiffs and members of the Class on their meritorious contract claim in bad faith and without belief in the non-existence of those contractual rights in violation of State Law.

59. As a direct and proximate result of defendants' tortious denial of the existence of such contractual rights, plaintiffs and members of the Class have suffered and are continuing to suffer serious damages and irreparable injuries including, but not limited to, loss and denial of benefits, financial injury, emotional distress and extra-contractual damages, in an amount according to proof at trial.

60. Defendants' wrongful conduct, as herein alleged, was intentional and was malicious, oppressive and fraudulent in nature and plaintiffs and the members of the Class are, therefore, entitled to recover punitive damages according to proof at trial.

COUNT FIVE
(Breach of Fiduciary Duty)

61. Paragraphs 1 through 60 of this Complaint are realleged and incorporated by reference.

62. Under ERISA, 29 U.S.C. §1002(21)(A), and

the principles of Federal Common Law developed thereunder, defendants are fiduciaries with respect to the pension and welfare benefit plans insofar as defendants exercised discretionary authority and/or control over the management of the plans and/or the management or disposition of the assets of the plans.

63. Under ERISA, 29 U.S.C. §1104, defendants owed plaintiffs and the members of the Class a fiduciary duty to act solely in the interest of the plans' participants and beneficiaries and to act for the exclusive purpose of providing benefits to participants and their beneficiaries with the care, skill, prudence and diligence of a prudent person in similar circumstances.

64. Defendants breached their fiduciary duty to plaintiffs and the members of the Class by (a) failing to discharge its duty solely in the interest of the plans' participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries; (b) failing to use the care, skill, prudence and diligence of a prudent person under the prevailing circumstances; and (c) failing to act in accordance with the plan documents and obligations under ERISA and controlling Federal Common Law.

65. Defendants' failure to act solelyin the interest of the plans' participants and beneficiaries constitutes a breach of their fiduciary duties under ERISA and Federal Common Law.

66. Defendants' attempt to avoid providing to

plaintiffs and the members of the Class with the benefits to which they are entitled was willful, wanton, malicious and with total and complete indifference to their legal rights.

67. As a result of defendants' breach of fiduciary duty, plaintiffs and the members of the Class have suffered, and are continuing to suffer, serious damages and irreparable injuries including, but not limited to, the loss and denial of benefits, financial injury, emotional distress, and extracontractual damages in a sum according to proof at trial.

COUNT SIX
(Promissory Estoppel)

68. Paragraphs 1 through 67 of this Complaint are realleged and incorporated by reference.

69. Under ERISA and the principles of Federal Common Law developed thereunder, defendants are prohibited from denying that plaintiffs and members of the Class were promised the same (or equal) pension and welfare benefits as Exxon's on which plaintiffs and members of the Class reasonably relied to their detriment.

70. In direct promises to ENC's senior management and employees and as provided in the acquisition agreement and supporting documents, defendants promised plaintiffs and the members of the Class the same (or equal) pension and welfare benefits as Exxon's prior to the acquisition.

71. Defendants intended and should have reasonably expected that these representations and promises would induce reliance thereon on the part of plaintiffs and the members of the Class.

72. Plaintiffs and the members of the Class did, in fact, reasonably rely upon the representations and promises made by defendants to their detriment including, without limitation, by (a) deciding to remain employed by ENC after its acquisition by defendants and foregoing other employment; (b) foregoing other employment offers during their tenure with defendants; and (c) foregoing other means of obtaining financial security for their pension and welfare benefits and future retirement. Defendants are, therefore, estopped from terminating or otherwise modifying the pension and welfare benefits to the detriment of plaintiffs and the members of the Class.

COUNT SEVEN
(Equitable Estoppel)

73. Paragraphs 1 through 72 of this Complaint are realleged and incorporated by reference.

74. Under ERISA, the principles of Federal Common Law developed thereunder, and this Court's equity powers, defendants are estopped from denying that plaintiffs and members of the Class were promised pension and welfare benefits the same as (or equal to) Exxon's on which plaintiffs and the members of the Class reasonably relied to their detriment.

75. Over several years and through various publications and documents, defendants promised and agreed to provide plaintiffs and the members of the Class with pension and welfare benefits the same as (or equal to) Exxon's prior to the acquisition; however, these were not the true facts. The true facts, which were known only to defendants, were that defendants had no intention of continuing to provide plaintiffs and the members of the Class with pension and welfare benefits the same as (or equal to) Exxon's.

76. Defendants intended and should have reasonably expected that these representations and promises would induce reliance thereon on the part of the plaintiffs and the members of the Class to their detriment.

77. Being ignorant of the true facts, plaintiffs and the members of the Class reasonably relied upon the representations and promises made by defendants to their detriment including, without limitation (a) deciding to remain employed by ENC after its acquisition by defendants and foregoing other employment; (b) foregoing other employment offers during their tenure with defendants; and (c) foregoing other means of obtaining financial security for their pension and welfare benefits. Defendants are, therefore, estopped from terminating or otherwise modifying the pension and welfare benefits to the detriment of plaintiffs and the members of the Class.

COUNT EIGHT
(Declaratory and Equity Relief Under ERISA)

78. Paragraphs 1 through 77 of this Complaint are realleged and incorporated by reference.

79. ERISA, 29 U.S.C. §§1132(A)(1), 1132(A)(3), authorizes the bringing of a civil action by any participant or beneficiary of a pension and/or welfare benefit plan seeking to recover benefits due under the terms of the plan, to enforce their rights under the terms of the plan, and/or to clarify their rights to future benefits under the terms of the plan. Such relief may properly include the granting of injunctive or declaratory relief for the purpose of declaring a participant's rights or enjoining any act or practice which violates the provisions of ERISA.

80. There is now existing between plaintiffs, members of the Class and defendants an actual justiciable controversy, in respect to which plaintiffs and the members of the Class are entitled to have a declaration of their rights and further relief, including a mandatory injunction, because of the facts, conditions and circumstances set forth herein.

81. Various controversies presently exist between plaintiffs and the members of the Class on the one hand, and defendants on the other hand, over the pension and welfare benefit Plans, the promises and acquisition agreement, and the propriety of the defendants' conduct with respect to the administration, modification and

termination of the subject pension and welfare benefit plans. Such controversies involve the following subjects:

(a) Whether defendants breached their direct promises to plaintiffs and members of the Class by unilaterally modifying and terminating benefits promised to them and for which plaintiffs and members of the Class have given substantial services;

(b) Whether defendants breached the acquisition agreement by unilaterally modifying and terminating benefits which defendants promised and agreed to provide to plaintiffs and members of the Class and for which plaintiffs and the members of the Class have given substantial services;

(c) Whether defendants' unilateral modification and termination of benefits was invalid as to certain plaintiffs and members of the Class who had attained annuitant status prior to the modification or termination of benefits;

(d) Whether defendants have interfered with the rights of certain plaintiffs and members of the Class to attain annuitant status; and

(e) Whether the plans are ambiguous and failed to reserve the right to modify or terminate benefits.

82. Plaintiffs and the members of the Class contend that defendants' conduct and their position as to each of the foregoing questions violate the applicable plan

documents, is a breach of defendants' fiduciary duties as plan administrator or trustee and violates applicable provisions of ERISA and Federal Common Law. These controversies are ripe for resolution by this Court because plaintiffs and the members of the Class are all of an age where planning for future and retirement is absolutely essential to their financial and emotional well-being, or has already been precluded by the ravages of time and disease.

83. Accordingly, plaintiffs and the members of the Class are entitled to an order clarifying their rights, duties, and obligations (and those of defendants) as to current and future benefits under defendants' plans pursuant to §502(a)((1) of ERISA, 29 U.S.C. §1132(a)(1), and 28 U.S.C. §1332.

COUNT NINE
(Injunctive Relief)

84. Paragraphs 1 through 83 of this Complaint are realleged and incorporated by reference.

85. Plaintiffs and the members of the Class have no plain, adequate, speedy, or complete remedy at law to address the wrongs alleged herein and the preliminary and permanent injunctive relief sought in this Class Action is the only means of securing prompt and adequate relief. Plaintiffs and the members of the Class will suffer irreparable injury as a result of defendants' wrongful acts and practices described herein unless injunctive and declaratory relief is granted.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, on behalf of themselves and the members of the Class, pray for relief as follows:

1. That this Court declare, adjudge and decree that this action is a proper Class Action.

2. That this Court adjudge, declare and decree that defendants violated:

(a) The terms of the plans providing for pension and welfare benefits for plaintiffs and members of the Class;

(b) 29 U.S.C. §§1022, 1024, 1102, 1104, 1132(a)(1), 1132(a)(3), and 1132(c) and 29 C.F.R. §§2520.102-2, and 2520.102.2; and

(c) Plaintiffs' contractual and equitable rights under the Federal Common Law of ERISA.

3. That this Court adjudge, declare and decree that defendants breached:

(a) The direct promise made on August 12, 1986, and in December 1986 to provide plaintiffs and the members of the Class with the same (or equal) pension and welfare benefits as Exxon's prior to the acquisition; and

(b) The December 31, 1986 acquisition agreement

which expressed defendants' intent to assume Exxon's obligation to provide plaintiffs and the members of the Class with pension and welfare benefits that are the same as (or equal to) Exxon's;

4. That this Court adjudge, declare and decree that defendants are estopped from modifying and terminating any pension and welfare benefits that should remain the same as (or equal to) Exxon's, as promised to plaintiffs and the members of the Class, at defendants' expense, or at current contribution levels, without regard to the reduction, modification, or elimination of benefits complained of herein.

5. That this Court issue a temporary restraining order and a preliminary injunction pursuant to Fed. R. Civ. P. 65 ordering that defendants, their officers, agents, and employees and all those acting in concert or participation with them shall refrain immediately and pending the final hearing and determination of this action from:

(a) Modifying or terminating any pension and welfare benefits at defendants' expense, or at the current contribution levels, as complained of herein; and

(b) Violating the terms of the Plan providing for pension and welfare benefits to plaintiffs and the members of the Class at defendants' expense, or at the current contribution levels,

under the contracts and agreements between plaintiffs and the members of the Class on the one hand, and defendants on the other hand, and the aforesaid provisions of ERISA.

6. That this Court issue a permanent injunction perpetually enjoining and restraining defendants, their officers, agents, and employees and all those acting in concert or participation with them from:

(a) Modifying or terminating any pension and welfare benefits at defendants' expense or at the current contribution levels, as complained of herein; and

(b) Violating the terms of the Plan providing for pension and welfare benefits to plaintiffs and the members of the Class at defendants' expense, or at the current contribution levels, under the contracts and agreements between plaintiffs and the members of the Class on the one hand, and defendants on the other hand, and the aforesaid provisions of ERISA and Federal Common Law.

7. That this Court issue a permanent injunction requiring defendants to establish and maintain a written instrument fully and completely describing their plan and providing pension and welfare benefits to plaintiffs and the members of the Class consistent with the terms of the direct promise and acquisition agreement as prayed for herein, consistent with representations to and agreements

between plaintiffs and the members of the Class and defendants, and consistent with the aforesaid provisions of ERISA and Federal Common Law.

8. That this Court award plaintiffs and the members of the Class damages in an amount equal to the value of all benefits which they have failed to receive as a result of defendants' actions complained of herein, and all other damages resulting therefrom, together with interest and earnings thereon, all according to proof at trial; and the maximum damages authorized under 29 U.S.C. §1132(c), together with interest and earnings thereon.

9. That this Court declare, adjudge and decree that defendants' conduct was willful, wanton, malicious, in bad faith and with complete indifference to the rights of plaintiffs and the members of the Class.

10. That this Court declare, adjudge and decree:

(a) That plaintiffs and the members of the Class justifiably relied on defendants' representations and promises of pension and welfare benefits that would be the same as (or equal to) Exxon's; and

(b) That defendants are estopped from modifying and terminating any pension or welfare benefit promised and agreed to by them to plaintiffs and the members of the Class.

11. That this Court declare, adjudge and decree that defendants failed to act solely in the interest of plaintiffs and the members of the Class, in violation of 29 U.S.C. §1104.

12. That this Court declare, adjudge, decree and grant all appropriate relief pursuant to 29 U.S.C. §1104.

13. That this Court issue permanent injunctions requiring defendants to resume and reinstate the promised and agreed to pension and welfare benefits to which plaintiffs and the members of the Class are entitled.

14. That this Court decree such other injunctive relief and/or enter such other orders as are necessary to dissipate or relieve the effects the aforesaid violations and wrongs, and illegal acts and conduct of defendants.

15. That this Court award to plaintiffs and the members of the Class any and all damages suffered as a result of the wrongs complained of herein including, but not limited to, any costs incurred by them for premiums, taxes and services as a result of the termination of benefits.

16. That this Court require that defendants pay the full costs of this action and plaintiffs' attorneys fees pursuant to 29 U.S.C.§1132(g), according to proof at trial.

17. That this Court award to plaintiffs and the members of the Class punitive damages in an amount according to proof at trial.

18. That the Court grant such other relief as may be just and proper.

19. Plaintiffs, by and through their counsel, hereby demand trial by jury in this action.

DATED: September 15, 1993

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APPENDIX G

9th Circuit Court of Appeals
Seattle, Washington

CHARLES W. LINDENMEIER, et al.	)	Appeal Docket No. 94-35530
	)	District No. CV-93-1261
Plaintiff-Appellants,	)	
vs.	)	
SIEMENS POWER CORPORATION	)	
	)	Seattle, Washington
Defendant-Appellees.	)	September 14, 1995

PETITION FOR REHEARING OF PLAINTIFFS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

THE HONORABLE ARTHUR L. ALARCON, PRESIDING
UNITED STATES COURT OF APPEALS
FOR THE 9TH CIRCUIT

THE HONORABLE WILLIAM C. CANBY, PRESIDING UNITED STATES COURT OF APPEALS 9TH JUDICIAL CIRCUIT

BY DESIGNATION THE HONORABLE JAMES M. FITZGERALD, PRESIDING SENIOR

DISTRICT JUDGE DISTRICT OF ALASKA

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES:

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FOR THE DEFENDANT:

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HENRY BROOK, Attorney
In house Counsel for
Siemens Power Corporation

PROCEEDINGS BEGIN
(Court is Called to Order)

MR. ROSSBACHER: Good morning Your Honor, my name is Henry Rossbacher. I represent Mr. Lindenmeier, and the other retirees and employees of Siemens Corporation. This is Mr. Kevin Roddy of Milberg, Weiss, and Mr. Ron McKinstry of Ellis, Li & McKinstry also represented.

We are before you today as a result of the grant of the 12(b)(6) motion by Judge Coughenour, which dismissed our case seeking retirement and pension benefits for the employees of Siemens Corporation, who were at Siemens Corporation at the time that Exxon Nuclear, as it then was, which is a subsidiary of Exxon. The stock was sold to Siemens. The first point I'd like to make --

THE COURT: Sir, you said retirement and pension benefits, is that what we're dealing with?

MR. ROSSBACHER: Yes, Your Honor. We are dealing with not merely welfare benefits, we are dealing with pension benefits including explicitly the SIDI benefit which has been terminated, and we're dealing --

THE COURT: Which benefit?

MR. ROSSBACHER: The SIDI, S-I-D-I, which is the supplemental income benefit, which you as a pensioner, had a right to, under the Exxon plan.

And let me get to two things, and then let me talk

about what the benefits are. First is that the parties before the Court is the same corporation, the same fiduciary that in fact, was there when all of this conduct took place. Exxon Nuclear, and it's admitted in our opponents brief in footnote 2, is in fact, the same corporation as Siemens Power Corporation.

So that the executives of Exxon Nuclear prior to the sale on December 31, 1986, became and remained the executives of the same corporation on the next day, when in fact, ownership changed.

THE COURT: Can I ask you a question?

MR. ROSSBACHER: Yes sir.

THE COURT: Are you saying -- I just want clarification. Are you saying that welfare benefits are the same -- are in the same category or are the same as -- as pension benefits?

MR. ROSSBACHER: I'm saying Your Honor, that before the Court is a mixture of benefits, pension benefits and welfare benefits.

THE COURT: But they're -- they're distinguishable.

MR. ROSSBACHER: They are distinguishable, except --

THE COURT: That's all I need.

MR. ROSSBACHER: Well what I need to get to is that Exxon is -- is a unique -- kind of unique benefit plan, and that was if one became an annuitant, it's sort of like

becoming a federal judge, Your Honor, you've got your pension and you've got your welfare benefits vested for life. The annuitant status, which was the goal of every Exxon employee, was to reach that status.

Once you reached annuitant status, if for example, Mr. Beard who was president of Exxon Nuclear and then president of Siemens Power, reached that status -- he's present in the courtroom, he's testified in this case. Once you reach that status, you have a right not merely to pension benefits, but to welfare and insurance benefits. That was the crux of the Exxon plan to protect it's employees.

The first point, Your Honor, is very important, because of something Judge Coughenour said on no factual record at all incidentally, which is -- which is one of the things that's really wrong about this case, is he held that the people who talked to the employees prior to the sale of the stock, weren't their fiduciaries. But in fact they were. Mr. Beard talked to them. Other executives of Exxon Nuclear talked to them, and they then were the fiduciaries under the Siemens plan as it was then constituted.

So that the idea that -- and when Mr. Pekarek came in from Siemens Corporation, and with the imprimatur of Exxon Nuclear and Exxon Corporation, made representations and gave documents to the employees of Siemens -- of Exxon. It is our position that those were representations being made by fiduciaries under the plan, and by the employer, to the employees. And it's very important, because Judge Coughenour found as a matter of fact, on the 12(b)(6) motion, that those representations were made by non- fiduciaries who had no duties to, in

fact, the employees, and that's simply not true. And the -- the identity of the parties makes that clear.

In fact, what was the promise? What was the representation, and what happened here? Well, we know what happened in part, because Mr. Beard, while he was an executive of Siemens, and before there was any dispute about this, testified as to what the promise was, what the representation was that was made to the employees. He testified with respect to the careers of people at Exxon Nuclear, all benefits and programs will be continued unchanged. Or in those cases where they can -- where they cannot be continued, they will be replicated. He testified that in '89 while represented in fact, by the lawyers who now oppose us. And that was -- that was in a separate lawsuit.

In addition then, what happened? And we didn't know this when we wrote the complaint. This is one of the vices of why -- of what happened here. In December of 1986, Mr. Beard, Mr. Stevens, and other executives signed on behalf of Exxon Nuclear and adopted a plan which is document 28 in Mr. Beard's deposition. That plan says that the Exxon plan confers annuitant status, that it -- and if you look at the plan, you must consult various text, and the exact language is different text and different times, you must -- you must consult the text when you become an annuitant.

Now I have a copy of this document, we have it, it's in the record. It says something else. It says that you have the right to achieve annuitant status if you maintain yourself as an employee in good standing. And it says that this plan, this plan of Exxon Nuclear, which continued on as the plan on January 1, when Siemens

owned it, was the plan in effect, could not be amended or terminated. If it was amended or terminated, it could not terminate a vested right. That clause was never submitted to Judge Coughenour by our opponents, who claimed to represent to him what the plan was. It is not the clause that he interprets in the motion to reconsider. Because the clause they submitted to him was one that said, if we terminate the plan, we cannot terminate a vested benefit. Something that the plan said, and they must have known it on January 1, 1987, it said if we amend or terminate, we cannot terminate a vested right.

So what we have then is a plan adopted after the agreement had been made by Siemens to buy the corporation, five days before the sale became effective, which has never been shown to Judge Coughenour. Then we have on December 23rd, three days before the plan was adopted, the memo from Mr. Borgmeier, who was head of personnel relations. It is a formal document. It is not an informal document. It is not a personal letter. It is on the letterhead of Exxon Nuclear Company, and what is says is as follows,

> "Effective January 1, 1987, you will become a participant in a new annuity plan which will provide a similar benefit program. The new plan will recognize past service with Exxon, and Exxon Nuclear for annuity purposes. It will also produce a result that, when combined with your Exxon annuity, will be equal to the annuity you would have received if you had remained in the Exxon annuity plan."

That is a formal document. It is the only document in existence on January 1, 1987, which constituted and

took the role of an SVD. It referred to other existing text as the plan adopted by the board of ENC had, and it inferred upon employees a level of benefits under the annuitant status. None of this, because we had -- we didn't -- we only had a limited discovery. We were then stayed, and were on 12(b)(6) motion because properly before Judge Coughenour, or for that matter, before the Court. But we alleged in the complaint that in fact, this memo governed and was part of the plan. And Judge Coughenour made a factual decision, despite Bower, which says that what is the plan, is in fact, a factual decision to be taken after full discovery, that in fact, this was not part of the plan, that this was some informal document that could be dismissed, discarded or not looked at, at will.

He also made the finding that Mr. Borgmeier, Mr. Beard and the executives even after, were not fiduciaries. They were sort of strangers to this. I would tell the Court, that if we were allowed to amend, we will show that in fact, Mr. Borgmeier and Mr. Beard ran a program where every employee affected, of Exxon, was brought in, was shown a few graphs, was given documents, and had orally and in writing, the plan explained to them. And what was explained to them, was that they were grandfathered into the Siemens plan. That a special plan had been created for them, and that they had these right. The rights under the annuity program, and the rights in fact, to attain annuity status. And what is also not in dispute, is that in fact, the plans then created these benefits. You are not faced with a situation here where the plan, after adopted, did not create the benefits.

This is a situation where not only did they create the benefits, but they kept them in place for five years. They

repeatedly told the employees who were affected, that the plans were the same as Exxon's for five years, and then they abruptly terminated them, and amended them, and terminated what we believe, after a full factual showing, will be vested rights, both to pension benefits, -- the complaint says pension benefits. Judge Coughenour didn't believe us apparently, he made a factual finding on a 12(b)(6), which I think this Court doesn't have to respect. And welfare benefits which became pension benefits through the -- unique Exxon annuity program.

What else do we know? We have alleged that in fact, the purchase price of this company was a adjusted by Exxon and Siemens, to reflect the cost and price of providing these benefits, whether you call them pension or welfare. We also know that -- although we have -- do not the facts and don't have discovery on it, that in fact, a claim was made by Siemens against Exxon to pay more money, and more money was paid, in order to pay the benefits.

In all candor, what more do we need to get discovery, and get the right at least, to have this decided on a summary judgment motion or after a trial. We allege that this was part of the plan. That's a factual decision. We allege that we have the right to full discovery. Let's talk about what just seems to go on. Oh, let's talk -- let's look again at this motion to reconsider. Because I think Judge Coughenour got led down a garden path. He was told by our opponents, who at the end, when they finally released some documents to us, flooded the court with documents. Then on a 12(b)(6), raced in and said, "Here are the documents that matter." Their explicit decision was to us, we'll give you the relevant documents, but we won't give you anything else. Well of course they gave us what they thought were the relevant documents.

They then tell Judge Coughenour that the plan is established as a matter of fact and law, and it wasn't. Judge Coughenour is lured into insuring in his motion to reconsider at page 4, a reservation of rights clause that didn't apply in 1987, and in fact, didn't even exist. The reservation of rights clause, or at least, the only we can find, although there may be others that existed, is in this document signed by Mr. Beard and Mr. McCullugh, "The employer may, at any time, amend or terminate this benefit plan in whole or in part, so long as the amendment or termination does not deprive any person of a vested right." Judge Coughenour, in his motion to reconsider, finds as a fact that this since the plan is terminated, no reservation of rights clause has been violated. He never saw this clause. How could he? We didn't have full discovery. He didn't have a summary judgment motion in front of him. Got rid of our case, though.

We allege the following. The first is, that in fact, we have alleged breach of plan, both as to pension and welfare benefits. If they're pension benefits, as we allege, the factual matter to be decided after full discovery. You can't dismiss our complaint.

Second we allege, that in fact, this is the quintessential case for estoppel. We have a situation where representations are made in writing and orally before the merger takes place, after the merger takes place. A document is issued that says you will have the same result of you are an annuitant, as if you had remain at Exxon. That promise is violated. And all we are asking is, not that you create a plan, no one here is asking this Court to craft a plan. All this -- all we ask you to do is order them from '91 on, to pay the same benefits that

they put in place themselves, from '87 to '91, and which they announced that they were changing. So there's no question as to what the benefits were.

In fact, they went to the people who said, you can retire under the old plan, the one we promised you. But if you don't we're going to take it away. So we know what the old plan is. If Greany and this circuit recognizes under Greany promissory stock -- we have that case, and I would recommend to you Judge Murnaghan's concurrence in the Elmore Case, Elmore cited with approval by Cinelli of the circuit. And what Judge Murnaghan said is, wait a second, you can't make in a contract with the employees, and we allege, and I'll get to it in a second, that there was a -- that there was a bilateral and a unilateral contract under Washington law and under federal law made with these employees, and then in an afterthought document take away the contract rights. That if estoppel means anything, that he was there speaking on bottom for equally divided 4th circuit, which wasn't somebody off in the woods, he said, it means you can't do that.

Our position is, not only had they conferred this through the Borgmeier memo, and through the plan -- through whatever else we may discover from them, if we ever get their documents, and get to talk to their executives, not one of whom we were allowed to depose, that we will find, that in fact, that promises were made.

That in fact, representations were made to Siemens, that would guarantee -- to Exxon, that we guarantee these benefits, and you have to give us enough money to pay them. That they negotiated in fact, on the basis of that representation, A), reduction in the purchase price of this

corporation worth several millions of dollars, and that then they went out and orally and in writing interpreted their own plan to their own employees, and they're stuck with it. And they can't come back later and decide, because the nuclear industry has gone down the tubes, bearing in mind that these employees were so important to Siemens that there was a secret agreement that Exxon would not hire them, bar three or four, there was a secret agreement, because the value was in employees.

So the employees, Exxon basically delivered them in bondage. They sold them to Siemens, and said, "You can't come back to your home country." These people had been Exxon employees. They believed in Exxon, and what did they do? Because Exxon is not an evil corporation. They said, "But you Siemens, have to treat them as if they were Exxon employees, and we're going to have a contract, and you're going to agree, and if we have to pay you money to do that, we will do that." And in fact, they did. So that none of this was particularly surprising. This wasn't some letter to some applicant, this was Mr. Borgmeier and his staff, and Mr. Beard's staff, and Mr. Beard, orally interpreting and written interpreting, and establishing the rights. And our position is whether under estoppel or under the violation of the plan, it can't take them away.

THE COURT: Let me ask you a question, because you're saying we shouldn't look at all of the Siemens plan, because there are two reasons that this is -- the plaintiffs are entitled to win in this case. One is the basis that, under the Exxon plan, these -- these rights -- these welfare rights were vested and no document can in any way affect the vesting of those. You don't even look to the documents, you look to see whether they're vested or not.

Second is, if you go beyond that, you win on the basis of promissory stockholders. Have I summed it up?

MR. ROSSBACHER: No, I think -- I think with great respect, Your Honor, the first one is a little different. We believe that the Borgmeier memo, since it was the only document that purported to describe pension and welfare plans, was a plan document, and that you should look at that document and interpret it. And that that document gives us --

THE COURT: You're right, I'm not arguing that. It does -- prior to the acquisition year, those welfare rights were actually vested and could not be altered.

MR. ROSSBACHER: They were vested --

THE COURT: You're saying it could have been --

MR. ROSSBACHER: If you -- if you have annuity status, it is clear that they were vested and could not be altered. Definitely clear, and that's what the Exxon plan said.

THE COURT: I don't want to -- I don't want to state -- I want to know your -- your contention.

MR. ROSSBACHER: Our contention is that the Borgmeier memo vests annuitant status, and the right to achieve annuitant status, because it will achieve the same result. We also believe under Sprague, Your Honor, the GM case under Sprague, that we have -- that we have a federal common law claim for breach of contract.

Now the Court can decide whether to recognize it or

not, but in the Sprague decision, the Court says, it's either a breach of the plan or it's a breach of the contract. The Bower case, in this circuit, acknowledges that in fact, you can vest benefits under ERISA by contract. Now we believe that we have properly plead and proved that in fact, the promise, if you will stay with us, we will create these plans, and you, with respect to your time here, will have the right to those plans, is a contract that they accepted and performed. And performed for five years. There is one other point I would make, Your Honor, I see my time is up.

THE COURT: Yes.

MR. ROSSBACHER: Our fiduciary duty claim, is governed by the Howe case, which we believe the 9th circuit law on this is wrong. We believe the Supreme Court -- we know the Supreme Court will hear oral argument on whether there are individual fiduciary duty claims on November 1. It is fully briefed, and -- and will be argued on November 1 before the Supreme Court. And with respect, we believe, the decision in Howe is right and the Supreme Court will find that. And that being so, depending on when you decide this, we believe that the Howe case will determine our claim for fiduciary violation. Thank you very much.

THE COURT: We'll hear Siemens. Mr. Miller.

MR. MILLER: May it please the Court, I am Dilbert Miller, the counsel for the appellee, Siemens Power Company and Siemens Corporation. With me at counsel table is Mr. Henry Brook, in-house counsel for Siemens.

The -- I -- I cannot believe that I was so successful in

leading Judge Coughenour down the garden path. I don't think that's very likely. Judge Coughenour is not one who is led down the garden path. I think that he read the complaint carefully, he analyzed it properly, and he made the correct ruling. The issue before this Court is a legal one basically, and it has to start with the complaint.

I'm very mindful of the heavy burden on a 12(b)(6) motion, and I think that the key issue is to, in fact, look at not what plaintiff argues here today, but what did he allege in his complaint, and based on those allegations, was it proper to dismiss it. And the complaint -- it makes it very helpful to us, because they summarize their allegations in paragraphs 2, 3 and 4 of the complaint. Paragraph 2 of the complaint says,

> "Pursuant to a direct contractual promise made to plaintiffs, and under the acquisition agreement hereinafter described, defendants promised and agreed to provide the same or equal pension and welfare benefits as Exxon's benefits at the time of the acquisition."

The guts of the complaint is, that there was a promise made in the acquisition agreement or in connection with the acquisition negotiations, to put in place a plan like Exxon's, and that is the heart and soul of the plaintiff's complaint.

Paragraph 3 alleges that we did that. We put in place a plan that replicated those features. And paragraph 4 then says, we breached that promise.

> "Defendants reneged upon their obligations and announced their unilateral elimination and

reduction of plans benefits, and violated the direct promises and agreements made to plaintiffs."

Now, if you go through this long complaint, which is 85 paragraphs long, and 41 pages, they -- all of the theories turn on the same factual core, and that factual core is found in paragraphs 19 and 44. And if you -- if you just read the allegation of the complaint, which is what Judge Coughenour did, you'll find -- you know, paragraph 21, Mr. Pekarek attended a meeting in August and made oral promises. Paragraphs 25 and 28 repeat the allegation that there were these oral promises. They allege that the acquisition took place. There were newsletters sent, and all of this material. And it all boils down to the same thing, the fundamental principle of the plaintiff's complaint was that a promise was made outside plan documents as to in oral conversations and informal memoranda, in meetings reflected in view graphs as to what the Siemens plan would be like. And that promise was, that it would be like Exxon's.

Now after five years -- five years later, Siemens make some modifications to the welfare benefits plan. It increased the deductible. It eliminates survivors income benefit insurance, which is the one he refers to as the quote, "pension plan." It isn't pension at all, it's a supplemental income insurance program for survivors, not for the employee. But if an employee wanted to have an additional insurance policy for the benefit of -- of dependents, they could buy that, and so that's an additional welfare benefit. It had nothing to do with the vested pension rights of the employee. So there's no mistake here that this is a case involving welfare benefits.

There is no allegation in the complaint that the plans are being administered contrary to the -- changed provisions. And more importantly, there is no allegation that the Siemens plan documents provide for the vesting of welfare benefits.

Now, let's assume for a minute, that all the allegations made that the plaintiff's made are true, which we have to do on a 12(b)(6) motion. That all of these discussions were held, these negotiations were held, and so forth. The fundamental principles in -- that apply to Siemens cases that -- were used by Judge Coughenour, is that your rights under an ERISA plan have to determine from the plan documents. All of this pre -- prior stuff in December and earlier simply is of no relevance. And if you read the allegations of the complaint, paragraphs 19 to 44, that's what all these allegations are all about, and Judge Coughenour, commendably cut through it all and said, "That doesn't state a claim, because --

THE COURT: They talk about a letter, and that is referred to as an informal document.

MR. MILLER: This is -- the letter that he's referring to is the Borgmeier letter in late December of 1986, which is another letter to employees, a notice as -- basically saying the same thing that everyone else says, we are going to adopt a plan that is comparable to the Exxon plan.

THE COURT: How do you distinguish between what is not a plan document and what is a plan document? What's the rule for that?

MR. MILLER: I think the rule for the -- the plan

documents, is what is referred to as the summary plan description, and then a reference to the various features that come from that. If the summary plan description describes a health insurance program, that a plan document consists of a summary that describes those benefits, and then the insurance policy that is adopted with respect to it. And I think that is the -- the material that one has to look at.

But if you look at the summary plan documents, both the Exxon version that preceded the end of the year -- the acquisition, and the one that followed, they both have a provision that says that the company has the right to change it. So the Siemens plan is comparable in a very, very significant way to the Exxon plan, in that both of them reserve the right to change the plan in the future. And that is fatal to the plaintiffs case, whether it's pre-acquisition or after acquisition. Now significantly, there is no allegation in the complaint -- let's look at the complaint. The complaint does not allege that the Siemens plan has a provision that vests welfare benefits. Now if -- is it likely that after preparing an 81 paragraph complaint covering 41 pages, if the Siemens plan document anywhere had said that welfare benefits vest, is it likely the plaintiffs would not have made that as an allegation? The point is, they couldn't make that allegation because it isn't there. Now, it's in absence of that allegation that there is no vesting of welfare benefits in the plan documents, which makes it clear that as a matter of law, their complaint fails.

THE COURT: Does that have to be true of both the Exxon and the Siemens plans?

MR. MILLER: No, it only had to be true of the

Siemens plan, I submit.

Because even if the Exxon plan vested welfare benefits, which I don't think it does, I don't think Exxon would concede that, the -- the promise that we're going to make them comparable in a -- in accordance to the cases, if you make a promise as to what the plan is going to be, that is unenforceable. The issue is, what did you actually do? And it's interesting, because we put in this reservation of rights clause in 1987, no one complains about it for five years.

So it isn't as if you have breached your commitment by all of a sudden, reserving right to change, and contend that it wasn't there before. So there was no complaint about that. Everyone recognized that welfare benefits can be changed.

THE COURT: Well, but as a matter of just, sort of, practice, I imagine that people don't complain until benefits go down.

MR. MILLER: Well I -- I think that's exactly right. But the point is, and the case law is clear, that if in fact, a company has articulated and set forth a clear, unambiguous, reservation of rights clause, then that's -- they're entitled to take advantage of that.

Now, I think that's going to the legal issues in this case. The issue -- the only issue with the -- the only cognizable claim that would even been be feasible, would be breach of plan terms. But they haven't alleged a breach of the Siemens plan terms. The allegations are that we didn't put in place a plan that we promised to put in place. They don't allege that we breached the Siemens

plan. That's why dismissal on 12(b)(6) was appropriate.

Now, with respect to the other claims, breach of contract, third party beneficiary contract, tortious denial of the existence of contract, I think the law is pretty clear that those are state law causes of action that have been pre-empted, and if they don't come in under the ERISA plan, these -- these claims are out.

THE COURT: We have a couple of stray cases that say if you are -- which I guess -- well I'll let you answer, which say that if you do not have an ERISA claim, if you are not able to bring an ERISA claim, your state law claim is not pre-empted.

MR. MILLER: Actually, I think there was a -- I thought -- I can't recall the case immediately, but I thought there was a case which said that one of the arguments that was rejected by the Court was that, if I don't have this state law claim, then I don't have a remedy.

THE COURT: Well --

MR. MILLER: -- and the Court said, "Hey, that's for Congress, not us."

THE COURT: We have one or two where they say, if you are not a participant and you do not have any standing at all, then you are not pre-empted in your state law claims.

MR. MILLER: Well, yeah, but I think this is a class action that purports to be brought on behalf of participants.

THE COURT: Participants, so that's -- those would be just irrelevant?

MR. MILLER: Yeah, I don't think that would be relevant, and there's another case where the 9th circuit held that when the company made representations to someone that they're -- if they take their lump sum tax -- lump sum retirement, that certain tax consequences will fall, that -- and the Court held that there was -- they could sue for that bad tax advice, when individuals end up having to pay the IRS a chunk of change. But the point was that that claim did not relate to the plan, because it didn't have anything to do with what were the benefits you got, and so forth. And I don't think -- I think that's -- a case that doesn't -- doesn't govern here.

But I think that the pre-emption issue -- the pre-emption principles are very clear. I -- and counsel didn't spend much time on that argument, but I think our briefs make clear that, under the Olsen case, that this notion that somehow the federal courts are supposed to come forth and create a whole body of common law which parallels the state body of common law, I think is pretty well discredited. I mean the -- the Supreme Court clearly said that the right to create a common law of ERISA does not mean you get to re-write the statute, and it doesn't mean that you get beyond the statute.

I think that the breach of fiduciary duty claim is -- is also out. The point being, that when a company makes a change to the benefit plan, they do not act in a fiduciary capacity, they act in their settler capacity, and the case of West versus Greyhound, I think makes that clear, that employers are entitled -- they're not acting in the -- they can act in their settler function, not burdened

with fiduciary duties when they make a plan. And that -- changing a plan, and that's all this case is about. Five years later, they increase the deductible, and they made some little changes in the -- in the medical benefits program.

The other arguments they come for are estoppel, and I think that the -- there's been a whole series of recent cases. It's always hard in a case like this, the cases are coming so fast, that it's hard to keep up with them. But I was relieved in reading them all, that they all seem to be moving in support of what Judge Coughenour did, and I'll just refer the Court to a few of them. Of course, the case that generated a lot of controversy was the Curtis Wright versus Shoenyoung case that came out of the 3rd circuit, and there -- that's a 95 Supreme Court 115 F.2d 1223. It reiterates the principle that ERISA does not create any substantive entitlement to employer provided health benefits or any other kind of welfare benefit. That's a given. That's an absolute principle. A company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan. It's a Supreme Court principle, and that -- that Curtis Wright amended it's plan to deprive responsive health benefits is not a cognizable complaint under ERISA. It couldn't be any clearer in the Supreme Court case.

Another case that we cited was Dague D-A-G-U-E versus Gencorp, northern district of Ohio, a '94 case. Summary judgment where -- this is in our supplemental letter which we sent last March.

> "Summary judgment where there is an unambiguous reservation of rights to modify or terminate, there can be no extrinsic evidence, nor

recovery under breach of contract, breach of fiduciary, and common law estoppel."

The unambiguous reservation of rights clause eliminates, as a matter of law, all those issues. And plaintiff's alleged existence of a plan, the language of the plan, which is a clear -- contains a clear reservation of rights clause, was before the Court properly. If you allege a contract, the contract is deemed to be before the Court -- because that's the basis of your case, that's the Penthouse case, which we've quoted -- cited in our footnotes. So it was proper for the Court to look at that feature of the plan instrument, and the reservation of rights language is clear and unambiguous. You don't have to go any further, because under Dague, if you have that, it's not proper to look at extrinsic evidence, and there is not breach of contract or breach of fiduciary or estoppel.

In re Unisys, counsel brought to the Court's attention in some supplemental letter last week, the In re Unisys Corp. case. Counsel neglected to point out the companion opinion and In re Unisys came under the 3rd circuit on the same day, a related case in which counsel, with also counsel record, that's a 58 F.3d 896, which was not previously cited to the Court, and that case sustains dismissal of contract estoppel claims, and has a number of interesting principles.

"Where there is an unambiguous reservation of right to change, the Court will not consider other evidence of what the plan terms are. Also, there can be no -- there can be no reasonable reliance and estoppel where the reservations of rights provision is clear."

Page 901, the Court pointed out quote,

> "In rejecting automatic vesting of welfare plans, converse evidence is recognition of the need for flexibility with regard to employer's right to change medical plans."

I mean, arguably, I don't have to do this, because we have it in our reservation, but arguably, an employer doesn't even have to state that they reserve the right to change. Because Congress has made clear that welfare benefits are not something that you can't change. But in any event, we did make clear that we could change it. Page 902, In re Unisys, 58 F.3d 902, the written plan documents are written out. Quote,

> "Extra ERISA commitments, such as the right to receive free lifetime coverage must be found in the plan documents and stated in clear and express language. The written terms of the plan documents control and cannot be modified or superseded by the employer's oral understanding."

Page 902, the reservation negates vesting. The lifetime language was subject to reservation of rights clause, located elsewhere in the plans. Page 904,

> "An employer who promises lifetime medical benefits while at the same time reserving the right to amend the plan, has informed plan participants of the time period during which they will be eligible to receive benefits provided the plan continues to exist."

In this case, the Sperry retirees eligibility for benefits was qualified because it was subject to Unisys reserved right to terminate the plan.

THE COURT: If this citation hasn't been supplied to us before, you can leave that citation with the clerk after argument.

MR. MILLER: Yes, 58 F.3 896. I would submit it. Gable versus -- it cites with approval, Gable versus Sweetheart, 35 F.3rd 51, "Reservation of right is plainly inconsistent with any alleged intent to vest those benefits." And page 907, I think a beautiful logical point,

> "You cannot have reasonable reliance on the face of a reservation of rights clause. Due to the unambiguous," and I quote, "Due to the unambiguous reservation of rights clauses in the summary plan descriptions, by which Unisys could terminate it's retirees medical benefits plan. The regular retirees cannot establish reasonable detrimental reliance, based upon an interpretation that the SPD promised vested benefits."

It is simply not reasonable as a matter of law, to think that you have a vested right to welfare benefits when the plan says it can be changed. So that takes care of estoppel.

Now, there are two -- two other -- three other cases I'd like to mention in -- in conclusion. One with respect to the right to amend. Judge Coughenour denied plaintiff's right to amend, and I think the significant point there is that the right to amend must be the ability to

amend facts which are consistent with the preceding -- with the complaint that's being sought to amend. And in the -- this principle that you can't just go change your story and go a hundred and eighty degrees different from what you had in your first complaint, has been recently approved by this Court, in an opinion written by Judge Canby, Stone versus Travelers Corp., 58 F.3d 434, dismissal under 12(b)(6) without leave to amend is not error where plaintiff could not have cured deficiencies without alleging facts inconsistent with those alleged in the first amended complaint. And that's a -- that's a principle that I think applies here, and that Judge Coughenour applied here.

Another recent case, Judge Alarcon's opinion in Parker versus Bankamericorp., 50 F.3d 757, affirms a summary judgment dismissal by Judge Coughenour, who apparently was not led down the garden path by another counsel, and the point made in that opinion was that,

> "Inconsistent statements in interoffice publications cannot support a find of estoppel. Complete plan documents, which are currently being finalized will prevail."

That's on page 769. And quote,

> "Under ERISA, a party cannot maintain a claim for equable of -- estoppel of recovery with contradiction."

And let me close by referring to Gable versus Sweetheart Cup, Inc., 35 F.3d 851, 4th Circuit, 1994, and I command this Court -- or refer the Court to read this case in it's entirety, and it reiterates the principle that a

reservation of rights clause really ends the story with respect to all this -- all these cases. Had the -- and I think the case ends with an interesting observation. It says, the case, the Court was sensitive to the hardship that changes in welfare plans can have on retirees, and there's an excellent discussion of the balancing of competing social issues that are involved in Congress having made the decision not to require welfare benefits to rest, inflation changes and so forth. And I quote, it says,

> "In this case, an employer provided a generous medical benefit plan to it's active and retired employees, and reliance on this well established statutory right to make future modifications in the plan. Were we to hold that the company was prohibited from making any amendments, we would strip employers of a protection that Congress intended to provide them, and accordingly discourage employers from offering any insurance at all. The impact, frankly of allowing these kinds of claims, the claimed asserted here would be to discourage the protection to future employees and retirees, by making it so dangerous to put in place, welfare benefits. Because you're locked in forever, if you can base it on water cooler conversations and memorandum."

And Judge Coughenour laudably saw that, was that this case was about, and based on the allegations of the complaint, that's all we're asking, look at the allegations in the complaint. The case was properly dismissed as not meeting the standards that ERISA requires.

THE COURT: All right, thank you Mr. Miller. Yes,

your time's up if you want to take two minutes to respond, time frame permitting.

MR. ROSSBACHER: First, he didn't exactly read our complaint accurately to you, Your Honors. Paragraph 4,

> "As described hereinafter, defendant elimination and reduction of pension and welfare benefits violates the direct promises and agreements made to plaintiff, the acquisition agreement, federal common law and state law."

That's paragraph 4 in our complaint, we had certification of account class in which pension benefits and welfare benefits had been violated. So that throughout this complaint, perhaps uncertainly stated as someone would say, we tried to say these are pension and welfare benefits.

The second point is that the documented that no one really -- or the issue that he really doesn't want to address is the key issue. What is the plan? What documents constituted the plan on January 1, 1987? They produced a document -- issued -- they say it's an '87 document, no one seems to know when the first document was issued. The Borgmeier memo was issued at the time the plan became effective, described and referred to other documents, described it's provisions, and described it's effect. It was not a letter to an individual participant. It was a document issued by the company, mentioning and describing all of it's plans, distributed to every employee, and is equally as formal as anything else issued. We believe that it's a factual issue. It's an issue that Judge Coughenour couldn't decide on a 12(b)(6) motion.

And third, we are not trying to allege anything inconsistent with our complaint. We are not switching horses in midstream. What is happening is, we didn't have all of the documents because we couldn't get access to the corporate files of the corporation. We had the documents that our employees, who are plan participants, had in their files. And the idea that without making full disclosure, they can come in and seduce a federal sitting judge, to make factual findings as to what documents constitute a plan, and then of course, when we come up with the document issued to everyone, which mentions in conjunction with -- with document 28, which mentions all plans, and say that's some informal boiler room or water cooler chatter, is simply unfair and untrue. This is more serious than that.

On January 1, these people had been delivered into their hands, a document which said, here is what you have, and interpreting it, and then it was interpreted for them orally and in writing, and we believe we state all the proper claims. We think that the 12(b)(6) motion should have been flat out denied. We don't think we need leave to amend on a notice pleading. But clearly, the denial of the right to amend where additional documents are coming in which show that they represented in court the wrong reservation of rights clause, shows that in fact, we have not been treated fairly in the District Court, and we should have a right to fully litigate our case. Thank you.

THE COURT: All right, thank you Mr. Rossbacher. Thank you both counsel, the case as argued is ordered submitted.

PROCEEDINGS CONCLUDED

* * * * * * * * * * *

APPENDIX H

STATUTORY PROVISIONS
EMPLOYEE RETIREE INCOME SECURITY ACT (29 U.S.C.):

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which--

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

* * *

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * *

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * *

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be

established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall--

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide--

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

* * *

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * *

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of

the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress

such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or

(i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or .

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms of the plan, by the Secretary, by any individual who

was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

* * *

(c) Refusal to supply requested information; failure to comply with notice requirements; penalties

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide

material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation. The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

Supreme Court, U.S.
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No. 95-1532

In The

Supreme Court of the United States

October Term, 1995

CHARLES W. LINDENMEIER, et al.,

Petitioners,

vs.

SIEMENS POWER CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and the court of appeals correctly concluded that Petitioner's Complaint, alleging that their employer had made certain changes to welfare benefits in breach of an alleged promise, failed to state a claim for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA).

2. Whether this Court's decision in *Varity v. Howe*, 116 S. Ct. 1065 (1996) is in conflict with or alters the well established principles followed in *Curtiss-Wright Corporation v. Schoonejongen*, 115 S. Ct. 1223 (1995), that welfare benefits are not vested under ERISA, that an employer's express reservation of the right to change welfare benefits is valid and effective, and that an employer, acting in its settlor capacity, making a change in welfare benefits does not violate fiduciary duties under ERISA.

PARTIES TO THE PROCEEDINGS

Petitioners are Charles H. Lindenmeier, Margaret K. Ballard, Joan K. Lusty, Richard H. Nelson and William W. Porath, individually and purportedly as representatives of an uncertified class alleged to consist of certain present and former employees of Respondent, Siemens Power Corporation. Respondents are Siemens Power Corporation and its parent, Siemens Corporation. Siemens Corporation is a wholly owned subsidiary of Siemens, A.G., a German corporation.

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BRIEF IN OPPOSITION

Respondents, Siemens Power Corporation and Siemens Corporation, respectfully request the Court to deny the Petition for Writ of Certiorari which seeks review of the Ninth Circuit's unpublished Memorandum Decision below. (Appendix A to the Petition).

STATEMENT OF THE CASE

Having been dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the Complaint (Appendix F to the Petition) and its deficiencies are central to the rulings made below and to the conclusion that no issue is presented that merits grant of the Petition for Certiorari.

The Complaint's structure and the detail of the evidentiary facts alleged therein, made it possible for the substance of Plaintiffs' claim to be ascertained with great clarity very early in the proceedings. Although the Complaint was 85 paragraphs in length, the heart of the Petitioners' allegations are that promises about what the employee benefit plans would be after the sale of Exxon Nuclear Company, Inc. by Exxon Corporation to Siemens (which promises were allegedly made in statements outside plan documents) were breached. It is alleged that *five years after the acquisition* certain changes were made by

the employer to the employee welfare benefits. Paragraph 2 of the Complaint reads:

> Pursuant to a direct contractual promise made to plaintiffs and under the acquisition agreement hereinafter described, defendants promised and agreed to provide the same or equal pension and welfare benefits as Exxon's benefits at the time of the acquisition.[1]

---

[1] The exact promise that was made is set forth in the Acquisition Agreement alleged in the Complaint and expressly stated that the new shareholder had an obligation to provide comparable (not identical) benefits *only for a six-month period* following the acquisition in 1986:

> 7.1 **Employees of ENC, ENII, and EN GmbH**. *For a period of six months following the Closing Date,* KWU [Siemens] shall cause ENC, ENII, and EN GmbH to offer continued employment to substantially all of their employees . . . as of the Closing Date with substantially comparable salaries and other terms and conditions of employment. However, *nothing in this Agreement shall be deemed to prevent or restrict in any way the right of KWU and its Affiliates* (including ENC, ENII, and EN GmbH) *following the expiration of such period* to terminate, reassign, promote or demote such employees, or *to change* adversely or favorably the titles, powers, duties, responsibilities, functions, locations, salaries, other compensation, or *terms and conditions of employment* of such personnel. . . .

ER 41:¶ 3, Exh. E at E-2 (emphasis supplied).

Paragraph 3 alleged that this promise was kept and that such a benefit plan was adopted[2] and implemented unchanged for five years following the acquisition – four and one-half years longer than the alleged promise required. Paragraph 4 alleges:

> Defendants then reneged upon their obligations and announced the unilateral elimination of and reductions in certain of plaintiffs' benefits. As described hereinafter, defendants' *elimination and reduction of pension and welfare benefits violate the direct promises and agreements* made to plaintiffs, the acquisition agreement described *infra*, Federal Common Law, ERISA, and State Law. (emphasis supplied).

The specific factual allegations of the Complaint (¶¶ 19-44) plead the evidence that is relied upon to establish the general factual assertions in paragraphs 2 through 4. The balance of the Complaint consists of jurisdictional allegations (¶¶ 5-18) and conclusory legal contentions (¶¶ 45-85) designed to try to fit the core facts into any one of nine "Counts" or causes of action including: breach of plan terms, breach of contract, breach of third party beneficiary contract, tortious denial of existence of a contract, breach of fiduciary duty, promissory estoppel, equitable estoppel, declaratory and equitable relief under ERISA, and injunctive relief.

---

[2] Although the employer entity remained the same corporation with a changed name, the benefit plans in effect prior to the acquisition were administered by the former parent and selling shareholder, Exxon Corporation. Accordingly, new plans had to be adopted following the acquisition by the new shareholder.

In response to Respondents' 12(b)(6) Motion to Dismiss, Petitioners chose to go well beyond the Complaint and inundated the district court with 662 pages of deposition testimony and ERISA plan documents. Following a careful review of the Complaint, the district court correctly stated the essence of Petitioners' case:

> The crux of plaintiffs' nine climes [sic] for relief is that Siemens was not free to have reduced or eliminated plaintiffs' pension and welfare benefits under ERISA and federal common law.

(Petition at 16a). Since the law is clear that an employer does have the right to change welfare benefits[3] offered to its employees, especially when it has clearly reserved the right to do so, the district court granted the motion and dismissed the case.

Petitioners moved the district court to reconsider its Order on Motion to Dismiss. The district court denied the Motion for Reconsideration. Although Petitioners never moved for leave to amend their Complaint, the district court construed the Motion for Reconsideration as such a

---

[3] The changes in benefits consisted of a change in the percentage of premiums that employees were required to pay for dependent coverage in the medical and dental plans, an increase in the annual deductible, and a change to other insurance plans that it offered. Although Petitioners make careless use of the term "pension benefits", no vested pension benefits were changed, only unvested welfare benefits. ER 29:¶ 2, Exh. A (detailing specific changes to Siemens welfare benefit plans).

request and denied it. (Petition at 33a). With the benefit of the large record before it, the district court concluded:

> The court finds that plaintiffs can prove no set of facts entitling them to relief under the legal causes of action set forth in the complaint.

(*Id.*) Therefore, the district court denied Plaintiffs' unstated request for leave to amend, and denied the Motion for Reconsideration. (Petition at 34a). No challenge to the denial for leave to amend is being made by Petitioners.

Petitioners appealed. They placed before the appellate court the entire factual record on the Motion to Dismiss, including 624 pages of deposition testimony. The court of appeals affirmed in a not-for-publication Memorandum. (Petition at Appendix A). It correctly applied the law to the alleged facts, when it determined that this Court's decision in *Curtiss-Wright Corporation v. Schoonejongen*, 115 S. Ct. 1223 (1995) controlled. (Petition at 6a).

Petitioners argued their case for a fourth time in their Petition for Rehearing. The court of appeals denied the Petition for Rehearing. (Petition at 14a). The Petition for Writ of Certiorari seeks relief only as to the application of the fiduciary duty "Count" to the facts alleged. Dismissal of the Complaint based on the eight other "Counts" is not challenged. The Petition, as to the fiduciary duty count should be denied for the reasons set forth below.

REASONS FOR DENYING THE WRIT

I. This Case Presents Merely an Issue as to Whether Petitioners Have Artfully Pleaded A Specific Claim.

The issue presented by this case relates only to whether the Complaint, which arises from and alleges a unique and specific set of detailed factual circumstances, was correctly read by the district court and by the court of appeals as failing to state a claim for which relief can be granted. As such, the issue goes merely to the adequacy of Petitioners' pleading.

The courts below were fully capable of carefully and accurately analyzing the Petitioners' Complaint and of applying controlling rules of law in making the determination that no claim was stated. The Complaint was scrutinized originally upon the motion and again on reconsideration by the district court and on the original appeal and again on application for rehearing by the court of appeals. After four such reviews, this case presents no need for this Court to also assess the adequacy of Petitioners' pleading.

Even if this Court were to take a different view of the adequacy of the Complaint, that is not grounds for granting the Petition. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10. There is no improper statement of law in this case and the Petition points to none.

There is no factual record upon which this Court can render a ruling of law on any issue of substantive importance. If there were an issue in need of being addressed

by this Court, the better course would be to await the presentation of a case with a fully developed factual record. This is a pleading case, properly left in the hands of the courts below, which does not present such a record nor such need nor such opportunity.

II. The Court of Appeals Correctly Followed the Applicable Decision of This Court: *Curtiss-Wright v. Schoonejongen.*

The court of appeals correctly stated and followed this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995):

> It is clearly established that welfare plans are not subject to the vesting requirements of ERISA. 29 U.S.C. § 1051(1); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983). "Because benefits under a welfare plan are generally neither vested nor accrued, an employer may amend or terminate benefits pursuant to the terms of the plan at any time." *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995). All that is required of a reservation clause (a clause that provides a procedure for altering welfare benefits in a plan) is a statement that a company reserves the right to amend at any time. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1229 (1995). Because the Siemens plan contained such a statement, Siemens was, and is, free to alter welfare benefits.

(Petition at 6a).

The court of appeals then pointed out a critical flaw in the argument of Petitioners that new-owner Siemens

had an obligation to continue the pre-existing benefits granted by ENC under the outgoing Exxon ownership:

> The Exxon plan also contained a reservation clause. Because Exxon was free to change their plan at any time, letters by Siemens or Exxon officials attesting to maintain Exxon benefits are not relevant. Siemens, like Exxon, was free to change its plan.

(*Id.*) (footnote omitted). A promise to replace a benefit plan administered by Exxon that could be changed, by a similar plan to be administered by Siemens that also could be changed, gives rise to no cognizable claim when years later the right to make changes is exercised.

Turning to Count V (Breach of Fiduciary Duty), the court of appeals applied a principle approved by this Court in *Curtiss-Wright*:

> It is established precedent in this circuit that *an employer does not act in a fiduciary capacity when deciding to amend or terminate an ERISA benefit plan.*

(Petition at 10a) (emphasis added).

This Court's analysis in *Curtiss-Wright*, leading to its consideration of the central question of that case (whether or not *Curtiss-Wright* amended its plan in a permissible manner), follows the same reasoning:

> In interpreting § 402(b)(3), we are mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams v.*

> *Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA6 1990) (*"[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"*).

Curtiss-Wright v. Schoonejongen, supra, 115 S. Ct. at 1228 (emphasis added). This Court then concluded:

> Accordingly, that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA; the only cognizable claim is that the company did not do so in a permissible manner.

(*Id.*)

The decision of the court of appeals to affirm dismissal of the fiduciary duty claim is perfectly in accord with the law as announced by this Court. The lower court did not decide "an important federal question in a way that conflicts with relevant decisions of this Court." Therefore, under Rule 10 there is no reason for issuance of a writ of certiorari.

III. The Allegations in Petitioners' Complaint Bear No Resemblance to the Facts Found in *Varity v. Howe.*

A reading of the Complaint reveals how badly Petitioners have misstated the record when they assert that they "pled a claim like the one recognized by this Court in [*Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996)]." (Petition at 8). The allegations in this Complaint are nothing like the facts in *Varity*. Review of the Complaint and the description of it in the Memorandum Decision by the court of appeals dispels Petitioners' wishful thinking that

this case is similar to *Varity*. The court of appeals' description of the allegations was:

> Plaintiffs brought this class action on behalf of approximately 600 current and recently retired employees of defendant Siemens Power Corporation who were participants in the employee welfare and pension plan offered by ENC [Exxon Nuclear Company]. On or about December 31, 1986, Siemens acquired ENC from Exxon (ENC's parent) pursuant to the terms of a stock purchase agreement.
>
> Plaintiffs claim that Siemens expressly agreed to continue to provide ENC employees with pension and welfare benefits equal to benefits they were entitled to receive under the Exxon plan. Plaintiffs contend that Siemens provided benefits to plaintiffs, similar to those provided by Exxon, for more than five years before unilaterally altering the pension and welfare benefit package.

(Petition at 2a-3a) (footnote omitted).

Petitioners' allegations stand in stark contrast to the facts of the *Varity* case, in which the trial court found that the employer had, through "serious deception" and "trickery", persuaded its employees to switch employers and join a new company that the defendant foresaw would fail, for the express purpose of shedding its obligations to the employees whom it induced to leave. *Varity Corp. v. Howe, supra*, 116 S. Ct. 1065, 1068 (1996). A decision made by Siemens to increase the amount of the deductible that employees must pay on their health insurance is hardly comparable to the facts found to exist in *Varity*.

Petitioners in the Petition at page 2 assert that they have pled a "specific claim for breach of fiduciary duty" citing the Court to Appendix 62a-63a of the Petition where paragraphs 61 to 67 of the Complaint are found. However paragraphs 61 through 67 of the Complaint contain no factual allegations. At paragraph 64, Plaintiffs merely recite the list of fiduciary duties found in the statute. *See* 29 U.S.C. § 1104(a). However, parroting the language of ERISA is not enough to state a claim for breach of fiduciary duty. *Haber v. Brown*, 774 F. Supp. 877, 879 (S.D.N.Y. 1991) (dismissing claim for breach of fiduciary duty where the plaintiff merely incorporated the terms of the statute without alleging a single fact to support its allegation).

The factual allegations elsewhere in the Complaint are that promises in various forms were made as to what features the benefits plans would contain when adopted and that they would not be changed. An allegation that changes were made to a benefit plan does not state a claim for breach of fiduciary duty. Petitioners have recognized the futility of even asking this Court to review the dismissal of their real claim, the contract claim for the alleged broken promise, and do not do so.

Petitioners wish to "repackage" this case about a change in benefits into a fiduciary duty case, but they have not and cannot assert facts[4] that bring their lawsuit within the ambit – or even the penumbra – of this Court's decision in *Varity*.

---

[4] Petitioners *cannot assert* such facts for three reasons: first, they don't exist; second, they never moved below for leave to amend their complaint; third, they have not challenged in this Court the denial below of an opportunity to amend.

IV. *Varity Corp. v. Howe* Pronounced No New Law Applicable to This Case.

This Court's recent decision in *Varity Corp. v. Howe*, while prompting Petitioners to eagerly attempt to repackage their dismissed case as a fiduciary duty case, nonetheless provides no reason to grant certiorari. The principles of *Varity* do not apply to this case, and in any event, those principles were briefed and argued below and are not new authority.

A. *Varity* Issues Are Not Present In This Case.

This case was correctly decided under this Court's decisions in *Shaw v. Delta Air Lines* and *Curtiss-Wright Corp. v. Schoonejongen*. *See* discussion at pp. 7-9 above. Analysis of the *Varity* opinion demonstrates that the legal principles of that case do not reverse or modify *Curtiss-Wright Corp. v. Schoonejongen* and they do not pertain to this case.

The principal legal issue before this Court in *Varity* was whether ERISA authorized an award of relief to individual beneficiaries for breach of fiduciary duties, as distinguished from relief for the plan itself. However, a review of the record of the decisions in this case reveals that that issue is simply not in this case. The standing of the Plaintiffs to assert fiduciary duty claims was not challenged and was not the basis of the dismissal of their claims. Their claims were dismissed not because they lacked standing to bring them, but because they lacked merit under the specific facts alleged.

The second issue addressed in *Varity* was whether the employer in *Varity* was acting in its fiduciary capacity when it engaged in its "deliberate deception." This provides another fundamental distinction between Petitioners' claims and the doctrine of the *Varity* decisions. The decision in that case arises from the finding of the district court that "Varity was wearing its 'fiduciary,' as well as its 'employer,' hat." *Varity Corp. v. Howe, supra,* 116 S. Ct. 1065, 1071 (1996). *Varity* did not challenge that finding. (*Id.*) There is no such factual finding in this case. The *Varity* case therefore came to this Court in the exact opposite posture of the current one, in which the lower courts concluded that Respondents (according to these Petitioners' own allegations) were not acting in a fiduciary capacity. (Petition at 10a).

The specific facts of *Varity* do not change the well established rule quoted by this Court with approval that *"A company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan". Curtiss-Wright Corp. v. Schoonejongen, supra,* 115 S. Ct. at 1228. *See Amalgamated Clothing & Textile Workers v. Murdock,* 861 F.2d 1406, 1419 (9th Cir. 1988); *West v. Greyhound Corp.,* 813 F.2d 951, 955-56 (9th Cir. 1987); *Cunha v. Ward Foods, Inc.,* 804 F.2d at 1432-33.

This Court gave deference to the trial court's factual findings in *Varity*:

> In reviewing this legal conclusion, we give deference to the factual findings of the District Court, recognizing its comparative advantage in

> understanding the specific context in which the events of this case occurred.

116 S. Ct. 1065, 1071 (1996).

The district court in this case, and the court of appeals, had a voluminous evidentiary record submitted by Petitioners to consider. While the district court did not engage in fact-finding, it had the benefit of a large record submitted by Petitioners that included the testimony of the senior Exxon Nuclear executive who negotiated with Siemens regarding the issue of employee benefits prior to the acquisition. The district court concluded:

> The court finds that plaintiffs can prove no set of facts entitling them to relief under the legal causes of action set forth in the complaint.

(Petition at 33a). If this Court were to issue a writ of certiorari, it could not reach the legal issues presented by Petitioners without first redoing and then rejecting the factual analysis of the lower courts. Petitioners sprinkle their Petition with assertions that both lower courts made mistakes about the facts of the case. *See* Petition at 3 n.2, 11, 12. Those claims do not provide a basis, under the standards of Rule 10, for issuing a writ.

Finally, with regard to the third issue in *Varity*, the substantive breach of fiduciary duty, as previously discussed, the facts of *Varity* are quite different from those alleged in this case. While the Complaint is replete with allegations that a promise was made and then broken five years later by changes to the benefits, there are no allegations of deliberate deception, intentional misrepresentations or trickery.

None of the three issues addressed in *Varity* have applicability to the allegations of this case.

B. The Principles of *Varity* Have Already Been Considered and Are Not New to This Case.

Petitioners proposed second question presented is whether the case should be reversed and remanded for the court below to consider the recent holding of *Varity*. It is a bogus question for two reasons: first, as discussed above, the standing of individual plan participants and beneficiaries that controlled the outcome in *Varity* never arose below in this case and second, the principles of *Varity* have already been considered. There is no reason to do it again.

The conflict between the circuit courts that was resolved in *Varity* (relief for individuals) was not an issue before the Ninth Circuit in this case before, and there is no reason for it to be before it on remand. It has nothing to do with this case. Respondents never asserted that Plaintiffs' lawsuit failed because individual plan participants and beneficiaries had no right to state a claim for breach of fiduciary duty under ERISA. The district court did not dismiss the case because Petitioners lacked standing, and the court of appeals did not affirm the dismissal on that basis. Petitioners had the *right to* state a claim, they just failed to do it in the Complaint. This Court's resolution of the issue in *Varity* in favor of individual plan participants and beneficiaries had absolutely no bearing on this case in the first instance, and there is therefore nothing to reconsider on remand.

Furthermore, the principles of *Varity* are *not* new to this case. The decision that was affirmed in *Varity*, i.e., *Howe v. Varity*, 36 F.3d 746 (8th Cir.), *clarified*, 41 F.3d 1263 (8th Cir. 1994), was cited in Petitioners' Rule 28(j) letter to the Ninth Circuit dated September 6, 1995 presenting additional authorities before oral argument, was argued before the Ninth Circuit at oral argument (Transcript of Hearing, Petition at 89a) and was briefed by Petitioners in their Petition for Rehearing (Petition for Rehearing, at pp. 2 and 6).

The principles pronounced by the Eighth Circuit Court of Appeals and subsequently affirmed by this Court were before the Ninth Circuit Court of Appeals when this case was decided and the applicability or lack of applicability of those principles to this case was fully and properly considered. While this Court's recent affirmance of the decisions below in *Varity* lends greater authoritative weight to the principles previously announced by the Eighth Circuit, it does not provide any *new* law not previously considered by the Ninth Circuit in this case. That those authorities were recently *affirmed* by this Court necessarily means that there was no change in the law effected by *Varity*. There would be no point to remanding this case to the Ninth Circuit to consider the same authorities again.

CONCLUSION

Petitioners present two arguments for issuing a writ of certiorari. As shown more fully in the discussion above, neither argument is pertinent or supported by the record.

Petitioners' first argument is: "This case should be resolved in accordance with *Varity*." (Petition at 8). This argument must fail because the facts and legal principles of *Varity* are inapposite to the claims of Petitioners, and in any event those legal principles, if not the most recent decision affirming them, were before the court of appeals and were fully considered.

Petitioners' second argument is: "ERISA provides a statutory basis for relief for defendants' misrepresentations and a direct right of action for participants or beneficiaries." (Petition at 10) This argument for issuance of certiorari must fail because the courts below did not deny Petitioners a direct right of action under ERISA. Notwithstanding that Petitioners were allowed standing to assert such an action, the courts below correctly found that Petitioners had not stated a cognizable claim.

The petition should be denied.

Respectfully submitted,

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No. 95-1532

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CHARLES W. LINDENMEIER, et al.
PETITIONERS,

vs.

SIEMENS POWER CORPORATION, et al.
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY

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STATUTES, RULES AND REGULATIONS

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No. 95-1532

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CHARLES W. LINDENMEIER, et al.
PETITIONERS,

vs.

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY

THE NINTH CIRCUIT DID NOT ANTICIPATE THIS COURT'S RULING IN *VARITY CORP. v. HOWE* WHEN IT AFFIRMED DISMISSAL OF PETITIONERS' BREACH OF FIDUCIARY DUTY CLAIM.

Petitioners will be denied the protections established in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996) unless their Petition for Writ of Certiorari is granted, and this case is reversed and remanded to the lower courts for further proceedings.[1] Petitioners

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[1]The Petition may be decided by "a summary disposition on the merits." S. Ct. Rule 16

informed the court of appeals that this Court was considering the viability of a breach of fiduciary duty claim under the Employee Retirement Income Security Act of 1974 ("ERISA"). Appendix ("App.") 89a; Brief in Opp. 16. Nevertheless, the court of appeals issued its Memorandum Decision against Petitioners before *Varity* was decided. App. 11a, 13a & 14a.

RESPONDENTS OBSCURE PETITIONERS' DIFFERENT CLAIMS IN THEIR COMPLAINT.

Petitioners pled multiple claims in their complaint including breach of plan terms (App. 57a-58a) and breach of fiduciary duty. *Id.* 61a-63a. The court of appeals affirmed dismissal of Count One for breach of plan terms relying, in part, on *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1229 (1995) (reservation of rights clause). App. 6a. Petitioners do not seek review of the dismissal of Count One.

Respondents suggest that Petitioners' breach of fiduciary duty claim also fails under *Curtiss-Wright*. Brief in Opp. 7-9. However, dismissal of Count One of the complaint because the plan documents were found to contain unambiguous language of a reservation of rights clause does not foreclose Petitioners' separate claim in Count Six for relief based on breach of fiduciary duty arising from the same set of circumstances. *In Re: Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 57 F.3d 1255, 1264 n.13 (3rd Cir. 1995), *cert. denied*, 116 S.Ct. 1316 (1996). *Curtiss-Wright* does not apply on this issue. *Varity*, 116 S.Ct. at

1074 (distinguishing *Curtiss-Wright* and observing that "plan administrators often have, and commonly exercise, discretionary authority to communicate with beneficiaries about the future of plan benefits.")

AS IN *VARITY*, EXXON NUCLEAR COMPANY, INC. PURSUED A COMMUNICATION CAMPAIGN TO PERSUADE ITS EMPLOYEES TO ACCEPT THE COMPANY'S MESSAGE ABOUT THEIR FUTURE BENEFITS.

Respondents try unsuccessfully to distinguish this case from *Varity*. Brief in Opp. 9-11. In *Varity* the employees were summoned to a videotaped presentation and received literature from the company discussing employee benefits and benefit plans in order to induce the employees to transfer to the new employer. *Varity* at 1069 & 1071-72. Correspondingly, Exxon Nuclear Company, Inc. ("ENC") organized employee meetings with Vugraph charts and circulated written materials about benefits to the employees before and after the stock sale. App. 43a-53a. Through its communication campaign *Varity* encouraged employees to transfer to the new employer in order to save money misleading the employees about the security of their benefits with the new employer. *Varity* at 1068-69. Likewise in the present matter, ENC and the other Respondents wanted to maintain the talented labor force for the success of the sale and continued success of ENC. App. 43a-45a.

This Court concluded in *Varity* that the company

acted in its fiduciary capacity when it deliberately made oral and written misrepresentations to the employees (*Varity* at 1072-73) and that the company breached its fiduciary duty to act solely in the interest of beneficiaries and participants. *Id.* at 1074-75. Similar allegations are made in Count Six of Petitioners' complaint for breach of fiduciary duty. App. 61a (incorporating by reference prior fact allegations in the complaint) - 63a.

RESPONDENTS DELIBERATELY CONCEALED FROM ENC EMPLOYEES THAT THEY COULD CHANGE EMPLOYEE BENEFITS SIX MONTHS AFTER THE STOCK SALE DESPITE CONTRARY REPRESENTATIONS TO ENC EMPLOYEES.

Respondents incorrectly assert that *Varity* issues are not present in this case. Brief in Opp. 12-15. Remarkably, Respondents now admit in their Brief in Opposition that "in the Acquisition Agreement... the new shareholder had an obligation to provide comparable (not identical) benefits *only for a six month period* following the acquisition in 1986: ..."(emphasis in original). Brief in Opp. 2 n.1.[2] This statement

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[2]This alleged "Acquisition Agreement" is entitled Stock Purchase Agreement between Exxon Corporation and Kraftwerk Union Aktiengesellschaft and dated is December 19, 1986. Excerpts of this alleged Stock Purchase Agreement were produced by Respondents as part of their Reply Memorandum In Support of Motion to Dismiss. Petitioners were prevented from conducting any meaningful discovery in this case and were unable to investigate further the Stock Purchase Agreement.

contradicts the oral and written representations concurrently disseminated to its employees by ENC at that time. App. 43a-53a. Neither Respondents' admission or the alleged Stock Purchase Agreement was disclosed to ENC employees revealing the six month time limit on changing benefits to ENC employees.

Instead, ENC (and later other Respondents) assured its employees that their pension and welfare benefits would remain the same as or equal to the benefits previously provided and that the benefits would vest upon the attainment of "annuitant status" which was defined as 55 years of age and 15 years of employment. App. 43a-53a. Relying upon these representations, the employees remained with ENC through the stock sale forgoing other employment opportunities. *Id.* 33. By failing to disclose to the employees Respondents' view that employee benefits were subject to change six months after the stock sale, Respondents' oral and written representations to ENC employees about their future benefits were rendered materially misleading. *Varity* at 1074. ENC and the other Respondents intentionally deceived the employees to preserve the talented work force for the success of the sale and ENC, and thereby breached their fiduciary obligations to the ENC employees under ERISA.

In *In Re: Unisys Corp. Retiree Medical Benefit ERISA Litigation*, the Third Circuit defined the elements of an employer's fiduciary duties in communicating about plan benefits:

> Our decisions in *Bixler*, *Fischer*, *Curcio* and *Smith* firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.

In Re: Unisys Corp. Retiree Medical Benefit ERISA Litigation, 57 F.3d at 1264.

> Given these findings, we hold that the district court did not err as a matter of law in concluding that the duty did convey complete and accurate information that was material to its employees' circumstance arose from these facts since the trustees had to know that their silence might cause harm. The district court's findings that the company actively misinformed its employees by affirmatively misrepresenting to them that their medical benefits were guaranteed once they retired, when in fact the company knew this was not true and that employees were making important retirement decisions relying upon this information, clearly support a claim for breach of fiduciary duty under ERISA.

Id. at 1266-67.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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